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EMPIRE GOVERNMENT

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AN OUTLINE OF THE SYSTEM PREVAILING IN THE BRITISH COMMONWEALTH OF NATIONS

BY

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PREFACE

In view of the great advances which have been made of recent years in the constitutional relations between Great Britain and the self-governing Dominions, as evidenced in the Report of the Inter-Imperial Relations Committee presented to the Imperial Conference of 1926, the time appears opportune for the publication of a sketch of the general system of government which now prevails, both in Great Britain and in the Dominions and other possessions of the British Crown oversea.

My object has been to give an account of the existing system, that is, of the Empire, or, as it has latterly been termed, the British Commonwealth of Nations, in a purely statical aspect. I have not dealt with political considerations, except in so far as they affect past historical changes, nor have I ventured upon any speculations in regard to future developments. My sole aim has been to present a general view of the government of the Empire as it is.

In order to avoid confusion, and to give a clear outline of the subject, I have refrained from entering into the details of past history, except in so far as they are necessary for the elucidation of the existing position. Nor has it been thought advisable to enter into minute details regarding administration. Information on such matters must be sought in the recognized works dealing with constitutional history and constitutional law. At the same time, I venture to hope that this work may be of assistance to those who desire to obtain a general acquaintance with the salient features of what may be denominated the British system of government. With this object in view,

I have endeavoured to make the work as accurate as possible, and to furnish within a brief compass all the information necessary for the purpose. Here and there references to authorities are given, but I have not deemed it desirable to overload the work with them. My main object has been to assist the general reader and the student in obtaining a rapid and succinct acquaintance with the whole subject. With this in view, I have endeavoured to avoid the use of technical language, wherever possible.

In the chapter on the self-governing Dominions, I have given a full summary of the Report of the Inter-Imperial Relations Committee, with some necessary commentary.

M. N.

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PART I

TERRITORIAL GOVERNMENT

CHAPTER I

THE NATURE OF THE BRITISH EMPIRE

1. Historical Outline

(*a*) *The British Isles*

In order to obtain an approximate estimate of the constitutional position of Great Britain and the British Dominions, collectively termed the British Empire, or, more recently, the British Commonwealth of Nations, it is necessary, in the first place, to trace very briefly the evolution of Great Britain itself as a State, and thereafter that of the various parts of the Empire.

In considering this process, we have to remember that it includes not merely territorial expansion, whereby, firstly, the whole of the British Isles were brought under one Central Government, and, secondly, the sway of that Government was extended over various portions of the earth's surface, but gradual changes in the system of government, both in Great Britain and its dependencies, which may be described, collectively, as an evolutionary process. This process, however, has been neither constant nor uniform. To a large extent it has been imperceptible. Nevertheless, when any one period is compared with any other, it will be seen that certain very definite changes have taken place. It is not our purpose to discuss the desirability or the usefulness of such changes. It is enough to record that there has been a constant movement, at times either consolidating or disruptive, or centripetal or centrifugal. In other words, one of the main features of the

constitutional development of the British Empire has been movement, even though imperceptible at times. There has never been anything approaching a stage of complete inertia, or stagnation, which, from a constitutional point of view, is one of the drawbacks affecting States which, though in other respects highly developed, are governed under hide-bound constitutions. The position has been summed up by Lord Courtney in the following language: "The Constitution of the United Kingdom . . . is a living organism, absorbing new facts and transforming itself. Its changes are sometimes considerable and even violent; and then for long periods the movement is almost imperceptible, although it is quickly realized when we compare the outcome presented at different periods of time. The Constitution of to-day is different from what it was fifty years since; and fifty years hence it will certainly be different from what it is to-day."[1] The statement that the United Kingdom is a living organism holds good, also, of the wider entity known as the Empire or the Commonwealth of Nations. It is permissible, however, to refrain from sharing in any prediction as to the constitutional position fifty years hence. At the present day the tendency is against the formulation of any definite constitution for the Empire as a whole. Such an eventuality, however, in the shape of a written constitution, is not beyond the bounds of possibility.

The process of territorial expansion whereby England became one kingdom, though it was fairly lengthy, was comparatively simple. Its nominal completion took place a century before the Norman Conquest, at the time when Edgar (957–75) could call himself King of all the English, and at least overlord of Britain.[2] There cannot be said, however,

[1] *The Working Constitution of the United Kingdom*, p. 1.
[2] *The British Empire*, ed. by A. F. Pollard, p. 24.

to have been any effective sway over England until the time of William I and his successors. Under the English kings and the Danish rule of Canute the rule of the Central Government was ineffective and uncertain, and its efforts were almost entirely directed towards checking the forces of disintegration.

The Norman Conquest is regarded in many quarters as the period of the introduction of the feudal system in England. In fact, many feudal ideas had taken root before the Conquest. The Norman Conquest was, in effect, the engrafting of Norman, that is, Continental, ideas of government, as prevailing in that age, upon English institutions, that is, upon the habits and customs of the English people. While it is possible, here and there, to say with reasonable certainty that this or that feature of government is English or Norman, the whole system is, in effect, a blend, deriving elements from both, with, perhaps, something superadded. It is necessary to insist upon the antiquity of certain of these institutions, as indicative of the general continuity of the system, notwithstanding occasional disturbances, which, though violent, produced no serious departure from the general line of growth or advance. The most important of these disturbances, not to speak of occasional usurpations of the kingship, have been the Civil War, coupled with the Interregnum from 1642 to 1660, and the Revolution of 1688–9. Relatively speaking, they left the structure of government of the United Kingdom unaffected, although this is not to minimize the importance of the Settlement of the constitutional relations between the Crown and its subjects at the Revolution.

The institution for which, perhaps, the greatest antiquity may be claimed is the Crown itself. While the Norman Conquest introduced a new dynasty, and a more comprehensive idea of Royalty, combining both the national and the feudal ideas

of sovereignty, it effected no legal change in the nature of the succession to the Crown.[1] Although the Norman kings could not claim, and did not venture to claim, a hereditary right to the throne, they acknowledged the principle that, in theory at least, the kingship continued to be elective, as it had been under the English kings. Another principle, acknowledged from early times, was that the monarchy was limited in respect of its powers. Before the Conquest, the laws made by the kings required and expressed the assent of the Witan, or National Council, replaced in later times by Parliament. At various periods, certain kings endeavoured to substitute a system of absolute rule for this limited monarchy, but without lasting success. The principle of limited monarchy has endured.

Other attributes of the kingship which date from very early times are the Royal title, and various privileges which are now classed as belonging to the Royal prerogative. With regard to the title, it has been pointed out that "from the time of Athelstan the kings began to assume Imperial titles, with which the extensive European connections of that sovereign had doubtless rendered them familiar. These titles were probably not mere grandiloquent sounds, but were intended to proclaim the Imperial character of the sway which the King of the English asserted over the inhabitants of the whole island, and his independence of any external potentate."[2] The Royal title, using the term here as meaning the *style*, as contrasted with the succession, of the king, has come into special prominence recently in connection with the proceedings at the Imperial Conference of 1926, the Report of which states: "The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last

[1] Taswell-Langmead, *Const. Hist.*, 5th ed., p. 162.
[2] *Ibid.*, pp. 23–4.

fifty years has the Royal Title been altered to suit changed conditions and constitutional developments." In accordance with the recommendation contained in that Report, an Act of the Imperial Parliament (1927) has been passed, empowering the King, within six months after the passing of the Act, by Proclamation to make such alteration in the style and titles appertaining to the Crown as His Majesty may deem fit. The King's title will henceforth be: "George V by the grace of God, of Great Britain and Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India." Parliament shall hereafter be known as and styled the Parliament of the United Kingdom of Great Britain and Northern Ireland. It is an interesting feature of the constitution that Parliament cannot itself change the title of the King. All it can do is to make it lawful for His Majesty, "by his Royal Proclamation under the Great Seal of the Realm," to make such an alteration.

Another institution which has existed continuously from early times is the system of trial by jury. Originally the jurors were the sworn witnesses to facts. Subsequently, the jurors, subject to the direction of the presiding judge, became the judges of the evidence upon which they returned their verdict. The jury has, according to the best authorities, developed out of the fusion of two distinct elements, one of which can be traced to old English, the other to Norman law.[1] It was Henry II who established the system of Recognition by Sworn Inquest, which was a finding of facts by the oath of a body of impartial witnesses. There has been much dispute on the question whether the *judicium parium* of Magna Charta instituted the modern trial by jury or not. On the one hand, it has been argued that this referred only to the right of the great

[1] Hannis Taylor, *Origin of the Eng. Constit.*, i, p. 322.

barons, as a matter of parliamentary privilege, to be tried by their fellow-barons (*pares*) in all pleas of the Crown, in the great court of the King; on the other, that it included also the right of every subject to be tried by a jury of his countrymen, in both criminal and civil suits. The correct view appears to be that the term as used in Magna Charta only applied to a jury of peers—the equals of the barons.[1]

It was in the reign of Henry II that the monarchy was reorganized and fully developed as both feudal and national. The same king successfully maintained the legal supremacy of the State over the National Church. In other words, the kingly power was centralized in the king's own hands.

The next step in the extension of Royal dominion within British borders was the conquest of Ireland. Owing to the circumstance that it is only within very recent times that Ireland, as a whole, has submitted to the king's rule, there has been a widespread notion that the theoretical dominance of the Crown over that island is of recent origin. Actually, Ireland has been a part of the United Kingdom ever since its nominal conquest in the reign of Henry II, when it was formally annexed to the British Crown (1172). This conquest is said to have been completed in the reign of Elizabeth (1598), although Cromwell practically had to reconquer the island. It was at this time (1654) that thirty Irish members were summoned to sit at Westminster. This temporary legislative union was, however, broken at the Restoration.

From the time of Henry II English law was introduced into Ireland, though the Irish were allowed to retain their customary Brehon laws. The result was that English law became part of the traditional system of jurisprudence in Ireland from

[1] The subject is fully discussed by Maitland, *Const. Hist.*, 169–71; see also Hannis Taylor, vol. i, 308–20, 389.

very early times. The process was completed by Poynings's Law, whereby English public statutes were to have the force of law in Ireland. From that time the law of England has applied to Ireland. This still applies as far as the common law is concerned, though now both the Parliament of the Irish Free State (Saorstat Eireann) and the Parliament of Northern Ireland enact their own statutes for their respective territories.

The union of Ireland with England was thus a monarchical union, under one sovereign. It is noteworthy that Henry VIII assumed the title of King of Ireland under an Irish statute, which was confirmed by an English Act of Parliament (35 Hen. VIII, c. 3). The Union of 1801, whereby one United Kingdom of Great Britain and Ireland was constituted, was a legislative union, whereby, Scotland having previously been included, a single unitary State was formed.

The actual conquest of Wales by England was later in date than that of Ireland. It was annexed to the English Crown by Edward I (1284). In the reign of Henry VIII, Wales was completely incorporated into and united with England, all persons born in the Principality being admitted to enjoy and inherit all the freedom, liberties, rights, privileges, and laws of England; and lands in Wales were declared to be inheritable after the English tenures and rules of descent (1536).[1] That is to say, a Welshman stood on exactly the same footing, and was subject to the same law, as an Englishman. There was no separate Parliament in Wales, and thus no occasion for a legislative union. From the time when Wales became subject to the English Crown, it likewise became subject to the legislative authority of the English Parliament. It was not until 1543 that Wales received direct representation in the Parliament. In that year the Principality was divided into twelve

[1] 27 Hen. VIII, c. 26; Taswell-Langmead, p. 320.

counties, each empowered to send one knight to Parliament; while every borough, being a shire town, was to send one burgess.[1]

Scotland remained a distinct and separate kingdom from England for several centuries, having its own king, legislature, and laws. This independent existence of the northern kingdom accounts for the growth and maintenance of an entirely different legal system, which was founded upon the Roman law, and had little, if anything, in common with the law of England. That separate legal system has continued to the present time, subject to modification by statutes applying to the whole of Great Britain, or to Scotland separately. The union of the Crowns of England and Scotland which took place in 1601 was a personal union, due to the circumstance that the same person succeeded to the thrones of both kingdoms. Each of them continued to have its separate Parliament, and it was not until 1707 that a legislative union was brought about, and there came to be one united Parliament for England and Scotland together. England and Scotland remained separate kingdoms after 1601, and only became officially one United Kingdom of Great Britain from 1707. It is curious to reflect that "as the claim of the House of Suffolk under the will of Henry VIII, and the Acts of Parliament authorizing him to dispose of the Crown, was legally indisputable, the first king of the House of Stuart was in the eye of the law a usurper."[2]

The complete legislative union of Great Britain and Ireland, consisting of the three formerly separate kingdoms of England, Scotland, and Ireland, thus came into being in 1801, and continued until 1922, when it was dissolved by the creation of separate legislatures for the Irish Free State and for Northern

[1] 34 & 35 Hen. VIII, c. 26.

[2] Taswell-Langmead, p. 182; cf. Hallam, *Const. Hist.*, i, p. 289.

Ireland, the latter State, however, continuing to send thirteen members to the British Parliament.[1]

The Channel Islands and the Isle of Man, although they are included in the term "British Islands,"[2] do not form part of the United Kingdom.[3]

The Channel Islands are the only part of the ancient Duchy of Normandy, once ruled by William the Conqueror, which remain subject to the British Crown. They formed part of that duchy until 1205. The law of the Islands is based on the customs of Normandy as in 1205, contained in the Ancienne Coutume and the Grand Coutumier du Pays et Duché de Normandie, and neither the common law of England nor the Roman law prevails. The Imperial Parliament has jurisdiction to legislate for the Channel Islands, and so has the Sovereign, by Order in Council. It has been claimed that such Acts or Orders have no legislative force until registered, but such a claim is, on the one hand, inconsistent with the supremacy of Parliament, while, on the other hand, it has been laid down expressly by an Order in Council of May 7, 1806, that the registration of an Act of Parliament, in which the Islands are named, is not essential to its operation; while it is also contended, on behalf of the Crown, that registration is not necessary to give validity to Orders in Council. Jersey and Guernsey have each a local legislative body, known as the States, which can pass laws which are of force for three years, and, if approved by the King in Council and registered in the Royal Court, become permanent. English statutes only apply to the Islands if especially directed to apply either to all His Majesty's Dominions or specially to the Channel Islands.

[1] Government of Ireland Act, 1920.
[2] Interpretation Act, 1889 (52 & 53 Vict., c. 163), sec. 18.
[3] Chalmers and Asquith, *Const. Law*, p. 168.

The Islands, not being part of the United Kingdom, but a direct appanage of the Crown, have no representation in the Imperial Parliament.[1]

The Isle of Man is an old Celtic kingdom which, like the Channel Islands, has preserved a certain amount of independence. It was settled by Norsemen in the tenth century, and for the next 350 years was ruled by petty kings, acknowledging the supremacy of Norway. The Norse institutions set up by them—the Tynwald Court or legislature, the two deemsters or judges, and the six sheadings into which the Island is divided for administrative purposes—still survive. The Island was definitely occupied by the English in 1343. It was in the hands of several noblemen in succession, under grant from the Crown, which ultimately purchased the sovereign rights in 1765 from the Duke of Atholl. The legislature of the Isle of Man has general power to legislate, but the Acts passed by it must be approved by the King in Council and promulgated on the Tynwald Hill before they are valid. Imperial statutes are also in force which apply to the whole of His Majesty's dominions, or in which the Isle is specially named or included by necessary implication. English common law does not extend to the Isle of Man, whose laws are based on its own ancient customary law. Having its own legislature, the Island is not represented in the British Parliament. It is not, however, a foreign dominion of the Crown, and the writ of *habeas corpus* extends to it at common law.[2]

(*b*) *The British Dominions Overseas*

In the broad sense, the term "dominions" applies to all the possessions of the Crown outside the British Islands; in a

[1] Halsbury, *Laws of England*, vol. x, secs. 990–4, pp. 573–6.

[2] *British Empire* (Pollard), pp. 118–21; Halsbury, *ubi sup.*, secs. 995–8, pp. 576–8.

more specific and restricted sense, the term has come to be applied within recent years to those colonies which have attained full responsible government. India, as a whole, does not enjoy self-government, although there are parts of it which have recently obtained a certain measure of representative government. Nevertheless, though by no means fully self-governing, India occupies a special position, owing to its recognition as one of the seven British units in the League of Nations. The position of India in the League of Nations, in the words of a recent authority, "is at present hardly amenable to political logic. . . . The admission of India to the League is perhaps best explained as the first indication of India's future status rather than as an honour due to that which she occupies at present." In other words, as the same authority states, the position of India is a "constitutional anomaly." [1] The nature of the government of India is dealt with elsewhere in this work (Chapter III).

It will be desirable to deal, in the first place, with the oversea possessions in their extended sense, as embracing all sorts of possessions, whether self-governing or not. To avoid confusion, it is desirable to speak of them as "colonies," and to restrict the term "Dominions" to those fully self-governing colonies which have attained what is known as "Dominion status," and have been admitted to membership of the League of Nations. That membership, though of a body or association of States which is international, has nevertheless been taken as the recognition, both internally by Great Britain and externally by the foreign States who are members of the League, as one of the marks of the attainment by those colonies of "Dominion status."

It is also necessary, at the outset, to remember that definite

[1] Prof. A. E. Zimmern, *The Third British Empire*, pp. 15–17.

legal meanings have been attached to the term "British possession" and the term "colony," by the English Interpretation Act, 1889.[1] According to this, the expression "British possession" means any part of His Majesty's Dominions, exclusive of the United Kingdom; and where parts of such Dominions are under both a central and a local legislature (as, for example, a State in the Australian Commonwealth), all parts under the central legislature are deemed to be one British possession. And a "colony" is any part of His Majesty's Dominions exclusive of the British Islands and of British India; and where parts of such Dominions are under both a central and a local legislature, all parts under the central legislature are deemed one colony. The result of this definition is that the Isle of Man is a possession, but not a colony. The colonies do not include "protectorates" and "dependencies," which require separate consideration.

There have been several attempts to mark off British colonial history into periods. It is sufficient to make brief reference to them, though it should be pointed out that, owing to the differing stages of development of the different colonies, no clear line can be drawn according to the development which had been attained by all the colonies at any one time. While some colonies were in the first stages of occupation or settlement, others had long attained to self-government. Nevertheless, for convenience, authorities on the subject have concurred in dividing its history into periods, though there has not been agreement between them as to the duration of those periods. According to some, the line of demarcation is to be drawn at the time of the loss of the American colonies in 1783 (as confirmed by the Treaty of Paris, which recognized the independence of the United States). Here the division is

[1] 52 & 53 Vict., c. 63, sec. 18.

between what is known as "the old colonial system" and the extension of greater freedom in the direction of self-government to the colonies when they had attained what was deemed to be a proper degree of development. This division is adopted by Sir J. A. R. Marriott, who, however, states the reason for it in somewhat different language: "During the first period we founded, mainly, though not exclusively, by peaceful plantation, an Empire, great even then and with untold potentialities; we founded it and lost it. In the second period we have founded, partly by conquest, partly by discovery and settlement, an Empire still vaster in extent, and in potentialities superior even to the first." [1] This division is related to a particular event, and takes no account of constitutional development.

Another writer distinguishes between the development of the colonies as a whole and that of a single colony. To the latter he applies a general principle, according to which there is first the period of the explorer, then that of the trader, which is followed by Government protection, and lastly responsible government. As to the colonies at large, he adopts "the five usually recognized periods," which are: (1) 1497–1713, the time of the early voyages and exploration; (2) 1713–63, the period when the English secured a footing in India and captured Canada, and when the thirteen American colonies began to extend westwards; (3) 1763–83, the time of the loss of the American colonies, and of consolidation of the power of the East India Company; (4) 1783–1820, the time of the formation of Upper and Lower Canada, the extension of rule over the Mahratta States, Ceylon, Mauritius, Cape Colony, Malta, and certain of the West Indies; (5) 1820–1900, the era of the grant of responsible government in Canada, Australia,

[1] *English Political Institutions*, pp. 310, 315.

New Zealand, the Cape, and Natal; and the taking over of the government of India from the East India Company and its assumption by the British Government.[1] This roughly corresponds with the division adopted by another author, according to whom there have been the pioneer period, that of international struggle, the development and separation of America, the growth of English power in India, and the period of reconstruction and fresh development.[2]

The most recent division is that of Professor Zimmern, and is, indeed, indicated by the title of his work—*The Third British Empire*. The first Empire, he states, was a colonial empire of the older type, which "was abruptly extinguished or, at least, summarily curtailed" in 1776. Then, the British Empire "was given a second chance," and "this second British Empire reached the culmination of its power and of its development in the Great War. And now a third British Empire has come into existence, new in its form, new in the conditions which it has to face within and without its borders, new even in its name. For *The British Empire* of 1914 has now (1926) become *The British Commonwealth of Nations*." [3] To this many would add that since the Imperial Conference of 1926 there has come into being a fourth British Empire. It will be seen that to 1776 or 1783 (whichever be taken as the date of the loss of the American colonies) the divisions adopted by Mr. Marriott and Professor Zimmern correspond.

In truth, any divisions must be more or less arbitrary. They all overlap. Thus Canada was a British possession before 1783, and so remained after that date. So with Newfoundland, which is often spoken of as the oldest colony, although the first

[1] A. T. Flux, *The Building of the British Empire, passim.*

[2] Caldecott, *English Colonization and Empire*. See also *The British Empire*, p. 789.

[3] *Loc. cit.*, pp. 2, 3.

colony established there by Sir Humphrey Gilbert in 1583 was unsuccessful. Some colonies were abandoned; others, obtained by conquest, were subsequently re-ceded to their former owners.

It will be convenient to state shortly, with dates, the various modes in which the British possessions were acquired, and then to summarize the various modes of government which have been applied to them.

Modes of Acquisition.—*Capture.*—St. Helena, 1651. Gibraltar, 1704 (ceded, 1713). Malta, 1800 (ceded, 1814). Aden, 1839. Hong-Kong, 1841.

Capitulation.—Jamaica, 1655. Ceylon, 1796 (ceded, 1801). Trinidad, 1797. Mahratta States, 1802–3 (later formed into Central Provinces). St. Lucia, 1803. British Guiana, 1803 (ceded, 1814). Cape of Good Hope, 1806 (ceded, 1814). Mauritius, 1810. Burmah—Lower, 1826 and 1852; Upper, 1885.

Cession (by treaty, whether or not after war).—Canada, 1763 (Nova Scotia, 1713; New Brunswick, 1755; Prince Edward Island, 1758—first colonized by British, 1761; Quebec, captured 1759). Tobago, 1763. St. Vincent, 1763. Dominica (Leeward Islands), 1763. Grenada and the Grenadines (Windward Islands), 1783. Seychelles, 1814. Ajmere, 1818. Assam, 1825. Labuan, 1846. Berar, 1853. Federated Malay States, 1874–88. British North Borneo, 1877. Brunei, 1888. Nyasaland, 1891. Wei-hai-wei, 1898.

Annexation.—United Provinces (formed 1901) from Agra, 1803, and Oudh, 1856. Coorg, 1834. Natal, 1843. Punjab, 1849. Andamans, 1858. Nicobar Islands, 1869. Fiji, 1874. British New Guinea, 1884–8. Nigeria, 1885. Somaliland, 1885. Socotra, 1886. Zululand, 1887. British Baluchistan, 1888. British Central Africa, 1891. Sudan, 1898. Orange Free State, 1900. Transvaal, 1900. Cyprus, 1914 (originally occupied under treaty, 1878).

Settlement.—Bermuda, 1612. Newfoundland, 1613 (recog-

nized by treaty, 1713). Gold Coast Colony, 1618. Leeward Islands, 1623–66 (St. Kitts and Nevis, 1623; Antigua, Barbuda, and Montserrat, 1632; Virgin Islands, 1666). Barbados, 1627. Bahamas, 1629. Gambia, 1631. St. Lucia, 1637 (recognized by treaty, 1803). British Honduras, 1640. North-West Territories, 1670 (Alberta and Saskatchewan). New South Wales, 1787 (Victoria formed, 1851; Queensland formed, 1859). Ontario, from 1783. Sierra Leone, 1787. Tasmania, 1803. Manitoba, 1811 (originally Red River Settlement; Province of Canada, 1870). Tristan da Cunha, 1816. Straits Settlements, 1819 (and purchase, 1824). Western Australia, 1829. Falkland Islands, 1833. South Australia, 1836. New Zealand, 1840. British Columbia, 1858 (Province of Canada, 1871). Rhodesia, 1890 (occupied by pioneer expedition; Matabeleland occupied after war, 1893–4).

Occupation.—Ascension, 1815. Perim, 1857.

Purchase.—Madras, 1639. Bombay (dowry to Charles II), 1661. Bengal, 1670. Lagos, 1861.

Protectorate.—Basutoland, 1883. Niger Coast, 1884. Sarawak, 1888. Zanzibar, 1890. Uganda, 1894. East Africa (now Kenya Colony), 1895. Bechuanaland, 1895. Swaziland, 1902.

It will be seen that most of the early colonies were settlements or "plantations" of men from the Mother Country. The majority of the conquered or ceded colonies were acquired during the Napoleonic Wars, with such exceptions as Canada (ceded after the Seven Years' War), parts of India (acquired in the eighteenth and nineteenth centuries), and the Orange Free State and Transvaal (annexed in the Anglo-Boer War). The settlement of Australia towards the end of the eighteenth century was purely nominal, and it was not until well towards the middle of the nineteenth century that any extensive influx of population set in thither.

By the middle of the seventeenth century it had become evident that some kind of administration, directed from England, must be set up for the settlements oversea. This had no application to the regions under the control, real or nominal, of the great chartered companies, such as the East India Company (chartered in 1600), the Virginia Company (1606), the Southern or London Company (new charter, 1609), and the Northern or Plymouth Company (new charter, 1620—withdrawn, 1635). Maryland had been granted to Lord Baltimore, but became a royal province in 1692. Concessions were also granted of North and South Carolina. It was not long, however, before representative government "broke out" in all the American colonies from Nova Scotia to Savannah. The case of the Hudson Bay Company, which received its grant, through Prince Rupert, in 1670, was different. Its territory was not one where a large population could possibly live, and its only white inhabitants were the officers and trappers of the Company. There was thus no necessity for government of this region by State officials, and it was not until 1870 that this great area was purchased by the Dominion Government, the Hudson Bay Company retaining its trading rights, though its monopoly of trade had been abolished in 1859. The conquest by Wolfe in 1759 is often spoken of as the conquest of Canada. It was, in reality, only the conquest of French Canada. The region to the north had been occupied for many years previously by the Hudson Bay Company; and, west of Ontario, there had never been any effective occupation by the French —if, indeed, that western region was at all known to them.

Originally, in England, colonial affairs were left to the Privy Council. Then, in 1634, a separate commission was set up for the purpose. At the Restoration a Council of Trade and Plantations was instituted, largely at the suggestion of Lord

Chancellor Clarendon, who took a leading part in the extension of the colonial dominions of England, and the institution of a permanent system of colonial administration.[1] In 1674 a Committee of the Privy Council was set up for colonial affairs. The duty of collecting and conveying information was entrusted to the Board of Trade in 1696, but the executive power remained with the Secretary of State for Home or the Privy Council. In 1768 a Secretary of State for the American or Colonial Department was appointed, but his office, together with the Council of Trade and Plantations, was abolished in 1782 on the separation of the American colonies. In 1794 a Secretary of State for War and the Colonies was appointed, but the two departments were only united in 1801. It is probably due to this circumstance that so many early Governors were military men; though the circumstance of annexation after hostilities was also a factor. From 1801 to 1845 this fusion of offices continued. In the latter year the Secretary of State for War ("who must not be confounded with the Secretary at War, though nobody quite knew the difference") absorbed the Secretary at War, and a separate Secretary of State for the Colonies came into being.[2] This Minister, briefly called the Colonial Secretary, possessed an advisory power of veto on legislation of the self-governing colonies which was reserved for the Royal assent, and was (and is) responsible for the government of the remaining Dominions beyond the Seas in inverse proportion to the amount of self-government granted to them. In 1925 a further step was taken, when the administration of the Colonial Office in London was divided into three departments—(1) the Dominion department, which deals with

[1] See art. "Edward Hyde," by C. H. Firth, in *Dict. Nat. Biog.*

[2] *Brit. Empire* (Pollard), p. 227; Halsbury, *ubi sup.*, vol. x, p. 505; Egerton, *Origin and Growth of Eng. Colonies*, p. 161.

the self-governing dominions and the Imperial Conference when it assembles; (2) the Crown Colony department, which deals with Crown colonies and protectorates; and (3) the general and legal department.[1]

The representative of the Crown, acting through the Colonial Secretary as a member of the Cabinet which is responsible to the British Parliament, in a colony is styled the Governor, though in the self-governing dominions his title is that of Governor-General, while in India he is the Viceroy and Governor-General, responsible, however, not to the Colonial Office, but to the Secretary of State for India. No special significance, however, other than that of rank, attaches to the distinction between the titles of Governor and Governor-General, though a Governor-General occupies in relation to his Cabinet the same position as the King does to the Cabinet in England. The powers of a Governor or a Governor-General depend upon the King's Commission whereby he is appointed, while his duties are defined generally by his "Instructions." His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him.[2]

Crown colonies have been defined as those in which the Crown retains complete control of the officers carrying on the government, and the legislative power is either delegated to the officer administering the government, or is exercised by a legislative council which is nominated by the Crown either entirely or partly, the other part being elected. In these colonies (with the exception of British Honduras, the Bahamas, Barbados, Bermuda, Jamaica, and the Leeward Islands), the Crown has reserved to itself the power of legislating by Order

[1] *Annual Register*, p. 62.
[2] *Musgrave* v. *Pulido*, L.R. 5 App. 111; Tarring, *Law of the Colonies*, p. 33.

in Council—the original method of legislating for all the colonies.[1] A "representative legislature" is defined by an English statute as any colonial legislature which comprises a legislative body of which one-half are elected by inhabitants of the colony. In colonies with representative assemblies the laws made by them are almost invariably designated Acts; in colonies without such assemblies they are designated Ordinances. In the former, laws purport to be made by the King, or by the Governor on the King's behalf, or by the Governor alone with the advice and consent of the Council and (or) Assembly; in the latter, they are made by the Governor with the advice and consent of the Legislative Council (if any).[2] Generally, a "colonial legislature" means the authority, other than the Imperial Parliament or the King in Council, competent to make laws for a British possession.[3]

Crown colonies may be more comprehensively defined as those dependencies of the Crown (other than protectorates) which do not possess a responsible Government, i.e where there is no Ministry consisting of Ministers who are members of the legislature and responsible to that legislature.

Protectorates are not technically parts of the King's Dominions, but are administered in much the same manner as Crown colonies.

To those colonies which possess responsible government the term "Dominion" has been applied; and they are defined as "those colonies which possess elective legislatures to which the executive is responsible as in the United Kingdom, the only officer appointed and controlled by the Crown being the Governor or Governor-General."[4] While this definition is

[1] Halsbury, *ubi sup.*, sec. 857, p. 503. Basutoland also falls under the exception, but is really a protectorate.

[2] Tarring, *ubi sup.*, pp. 58, 63–4; Colonial Laws Validity Act, 1865, sec. 1.

[3] Interpretation Act, 1889, sec. 18.

[4] Halsbury, p. 504.

satisfactory, the term "Dominion," as used in this sense, is apt to lead to confusion, for in recent years it has come to be restricted, as we have seen, to those colonies with responsible government which have attained what is known as "Dominion status." The generic term applicable to all colonies with responsible government is "self-governing colonies."

Nearly all the former self-governing colonies have disappeared as separate political entities, and now form part of one or other of the Dominions, using the term in its more recent and restricted sense. Some of them still retain a Ministry responsible to the local legislature, as in the case of the Canadian Provinces and the Australian States; others have ceased to have a Ministry, as is the case with the Provinces of the Union of South Africa, which were formerly self-governing colonies. All of them in Canada, Australia, and South Africa are subject, that is, subordinate, to the superior legislation of the Dominion legislature, although in Australia, as in the United States of America, the residue of legislative powers, which is not defined by the constitution, belongs to the constituent States, and not to the supreme legislature of the Dominion.[1]

The Dominions are Canada, Australia, New Zealand, South Africa, and the Irish Free State. Three of them, as above stated, have been formed by the union or confederation of pre-existing colonies with responsible government. New Zealand was always a single colony, but was created a Dominion by Royal proclamation of September 9, 1907. India, as a whole, is not self-governing, and is officially designated as an Empire, but, as stated, is regarded as having attained Dominion status. The Irish Free State has also become a Dominion.

The other fully self-governing colonies are Newfoundland

[1] As to Canada, see Halsbury, *ubi sup.*, vol. x, sec. 931, p. 546.

and Southern Rhodesia. They have not yet been admitted to the League of Nations, and are thus not regarded as having attained Dominion status. The Prime Minister and (or) other Ministers of Newfoundland, however, attend the Imperial Conference, which is held in London, and is attended by the representatives of the Imperial Government, the Dominions, and India.

Northern Ireland occupies an anomalous position. It has self-government for local affairs, but is represented in the British Parliament.

Malta enjoys self-government, known as semi-responsible government, in internal affairs, but has no say in external matters; and the position is the same in most of the Indian Provincial Governments.

The Crown colonies and protectorates vary from government by a Governor with a wholly elected assembly to that by a Governor alone.[1]

2. The British Constitution

In employing the term "constitution" it must be borne in mind that it embraces not merely the monarchical and parliamentary features which have at all times been regarded as the distinguishing marks of the British system of government, but all those factors, some of which may appear relatively unimportant, which form elements in the working of the governmental machinery. In short, the constitution includes all the factors, written and unwritten, in other words, those which are either expressly stated in laws or statutes and other public documents, or are contained in well-recognized customs and conventions, which contribute to the "make-up" of the system of govern-

[1] *The Third British Empire*, pp. 18–19, contains a list of them as they existed in 1926 (see also Chapters IV, V).

ment and public administration, as distinguished from what is known as private law, that is, the aggregation of rights which affect private individuals only in their capacity as such, and not in relation to government. The laws and rights which regulate the working of government have greatly increased in the course of time, and, having regard to new features and advances, are capable of further development to an indefinite extent, when regard is had to the increasing scope of public administration. This scope is, in other words, limited only by the extent to which the legislature, or the Executive Government acting on behalf of the legislature, may deem it necessary or wise to include new subjects within the sphere of public, that is, governmental, activities. As far back as 1888 it was already possible for Professor Maitland to say: "The constitution does not nowadays consist merely of King and Parliament, Privy Council, Courts of Law, and some purely executive officers, such as sheriffs, obeying their command. We have changed all that since the first Reform Act. The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board, and, again, of the Justices in Quarter Sessions, the Municipal Corporations, the Guardians of the Poor, School Boards, Boards of Health, and so forth; these have become of the greatest importance; and to leave them out of the picture is to make the picture a partial one-sided obsolete sketch."[1] Since that time, to mention only examples, there have been added to the units of governmental activity the Ministry of Agriculture and Fisheries, the Development Commission, the Electricity Commission, the Forestry Commission, the Ministry of Health, the Ministry of Labour, the Medical Research Council, the Imperial Mineral Resources

[1] *Constitutional History* (ed. H. A. L. Fisher), p. 506.

Bureau, the Ministry of Pensions, the Port of London Authority, the Public Trustee Office, the Department of Scientific and Industrial Research, the National Savings Committee, and the Ministry of Transport; and, in local affairs, the County Councils (which have taken over, *inter alia*, the functions of the former School Boards), Urban and Rural District Councils, and Borough Councils.

It nevertheless remains true of the British constitution in its broadest aspect that it is (1) *monarchical*, (2) *parliamentary*; and these two features extend to every portion of the British possessions. The King is King of each and all of them; and the nature of the Royal authority is such that, without any express legislation for the purpose, it applies, by the will of the Crown, whether expressly stated or merely implied, and whether with or without any implied parliamentary sanction, to and throughout every one of them. The continued existence of the monarchy as the supreme governing institution in Great Britain and the British possessions is also assured, as will be seen, by the laws governing the title and the succession to the Crown. The constitution is also parliamentary, in that not only all the laws of the realm are made expressly and directly by Parliament or indirectly under its authority by virtue of powers delegated by it, but also all acts of government are subject to the supervision and ultimate control of Parliament. The quality of parliamentary government also holds good for the British possessions as a whole. The self-governing Dominions all possess legislatures which, with slight variations here and there, correspond broadly to the English type of parliamentary government. In the non-self-governing possessions, such as the Crown colonies, there is, in the last resort, control, theoretical at least, by the British Parliament. In all the oversea possessions also, excepting the Provinces of Canada, the officer

administering the government, whatever his designation, is appointed by the British Government; and in all of them, including Canada, he represents the Crown, and is answerable to the authority which appointed him.

These two elements, then, pervade the whole of the British Commonwealth of Nations. They apply not only to Great Britain and the self-governing Dominions, but to every part, whether directly self-governing or not, which goes to make up what is known as the British Empire. The statement of Lord Oxford and Asquith (then Mr. Asquith), when presiding at the Imperial Conference of 1911, is not merely rhetorical, but true in a strictly constitutional sense: "Whether in this United Kingdom, or in any one of the great communities which you represent, we each of us are, and we each of us intend to remain, master in our own household. This is, here at home and throughout the Dominions, the life-blood of our Imperial policy. It is *articulus stantis aut cadentis Imperii*. It is none the less true that we are, and intend to remain, units indeed, but units in a greater unity." He spoke of the "local autonomy" of each unit (referring here specifically to the self-governing Dominions, which had not at that time attained "Dominion status"), combined with "loyalty to a common head, co-operation, spontaneous and unforced for common interests and purposes, and, I may add . . . a common trusteeship . . . of the interests and fortunes of fellow-subjects who have not yet attained, or perhaps in some cases may never attain, to the full stature of self-government."

It is a characteristic of the English constitution, in respect of its form, that it is an *unwritten* constitution. This does not mean that the terms of the constitution do not exist in writing, which may be gathered from certain laws or documents, but that there is no formal written document defining and limiting its terms.

In other words, there is no single document, known as *the* constitution, from which the rights and powers of the various elements that make up the supreme governing authority and the people of the nation may be ascertained. In this respect Great Britain is an exception to the general rule prevailing among the nations of the world, the majority of whom are governed under a specific constitution or fundamental document wherein the respective authorities and divisions of government are defined and limited. The terms of the British constitution have to be gathered partly from laws which do lay down certain rights and powers, and partly from customs and conventions. But all of them are subject to change or modification. Thus, the constitution is neither written nor rigid. On the other hand, it is unwritten and *flexible*, that is, subject to change at will of the authority, namely, Parliament, which has the power of introducing changes. It follows, also, that the constitution knows no bounds, subject, in existing conditions, to the maintenance of the monarchy and the legislature. But, theoretically, there is nothing to prevent an alteration of the conditions under which the monarchy and the legislature exercise their functions—as by altering the Act of Settlement by which the Royal succession is defined, or by altering the constitution of either House of the legislature or abolishing one House, or even adding a third Chamber to the legislature. The flexibility of the constitution is, in fact, a necessary corollary to the circumstance that the constitution is unwritten. Inasmuch, also, as it is flexible and without defined boundaries, no limitation has been set to the power of the Crown or the legislature, or of both of them, to erect authorities to whom, in various portions of the British possessions, the power of law-making has been confided. Thus we have the phenomenon that while the British constitution is itself

unwritten, under it written constitutions, by Act of Parliament or Order in Council, have been granted to various colonies and Dominions, and that certain of these constitutions are rigid rather than flexible.

It follows from the extreme flexibility of the British constitution that it is readily *capable of amendment*. There are no restrictions on the power of Parliament to make any amendment, whether in respect of subject-matter or of the method by which an amendment is to be brought about. "There is no other European constitution," says Mr. Marriott, "so easy of amendment as that of England. Under the English constitution there would be no greater difficulty, in a formal and legal sense, in decreeing the abolition of the House of Lords or the House of Commons, than in procuring an Act for the construction of a tramway between London and Reading." [1] He contrasts with this the stringent provisions of the Australian constitution, contained in the Commonwealth of Australia Constitution Act (63 & 64 Vict., c. 12, sec. 128), whereby any proposed amendment of that constitution must first pass both Houses of the Federal Legislature by an absolute majority, or must pass one House twice after an interval of three months, after which it must obtain the assent of the people, expressed by means of a referendum, in a majority of the constituent States, and must also be approved by a majority of the voters who cast their votes in the Commonwealth as a whole. It has even been doubted whether the constitution of the Dominion of Canada can be altered without an Act of the Imperial Parliament; in spite of the general rule that, under the Colonial Laws Validity Act, 1865, any colony has power to pass laws affecting its constitution.[2]

[1] *English Political Institutions*, p. 20.

[2] Bernard Holland, *Imperium et Libertas*, p. 184; compare *Fielding* v. *Thomas* ([1896] A.C. 600).

Just as we speak of "responsible government" in relation to the self-governing Dominions, so there is *responsible government* in Great Britain. There is not only parliamentary government, but Cabinet government, that is, executive government by a ministry responsible to Parliament. The government of and by a Cabinet is not in itself parliamentary, that is, legislative or having the power of granting money or levying taxation, but it is in the last resort responsible to and controlled by Parliament. The Cabinet consists of the King's Ministers, whose existence as such depends upon the will of Parliament, that is, the support of a parliamentary majority; but they do not discharge the functions of Parliament. They carry on the executive government of the realm in the King's name, and, in doing so, they administer the laws which are passed by Parliament. But they do not legislate, except in so far as a delegated power of legislation has been entrusted to them by virtue of an Act or statute passed by Parliament. They may, and do, introduce Bills into Parliament for the purpose of being passed by that body; and they control the business of Parliament by virtue of the parliamentary majority which they command. It is in this sense that they are responsible to Parliament. The remarkable thing is that the Cabinet is unknown to the law, whereas the Privy Council is known to it. "No such body as the Cabinet is known to English law; no such office as that of Prime Minister is recognized by any statute; there is no legal provision which requires the King to appoint Ministers of whom the House of Commons approves, or to dismiss Ministers of whom it does not approve; the law knows nothing of the collective responsibility of Ministers; it knows nothing of their duty to resign, or to appeal to the country, when they are rebuked by an adverse vote of the popular Chamber. Of the existence of the Privy Council the

law is aware, but of the inner circle of the Privy Council, called the Cabinet, it knows absolutely nothing. The meetings of this inner circle are secret, and its proceedings, which are highly confidential, are not recorded. From a strictly legal standpoint the Cabinet is a mere phantom which passes between the Parliament and the Crown, impressing the irresistible will of the one upon the other. And yet, from a political and practical standpoint, the Cabinet is the mainspring of the modern constitutional system. So long, and only so long, as the Royal authority is wielded in obedience to the will of the majority of the House of Commons does the machinery of government continue in motion."[1] This is because "by the side of our written Law there has grown up an unwritten or conventional constitution."[2] In other words, though Cabinet government is unknown to the written law, it is now an established and essential part of the constitution. It should be added that the Premier or Prime Minister, who is the chief of the Cabinet, now has a definite precedence allotted to him, next after the Archbishop of York; but he is otherwise unknown to the law, being recognized by it only as the holder of some Cabinet office and as a member of the Privy Council.[3]

Although the Ministers carry out the Executive Government for and on behalf of the King, it is they who are responsible, and not he. While they are in office, it is understood that all the legal prerogatives of which the Crown is possessed by virtue of the written law shall—with certain exceptions to which reference is made later on—be entirely subject to their direction and control. As "the King can do no wrong," all unwise and improper acts are those of his Ministers, who can

[1] Hannis Taylor, *ubi sup.*, vol. ii, p. 437; and see pp. 438–40.
[2] Freeman, *Growth of the Eng. Const.*, p. 114.
[3] Chalmers and Asquith, p. 148.

be promptly and sufficiently punished simply by a dismissal from office.[1] This is the "sanction" attaching to their responsibility, that is, the means by which a check is exercised upon them. If, what is hardly conceivable now, the King were to attempt to govern without Ministers, he might be held responsible by Parliament, which, in the last resort, has the supreme power. It is because the functions of government are exercised by the Ministers that it is said that "the King reigns, but does not govern"—it is the Ministers who govern.

Another feature of the constitution is its *legality*. A large part of the constitution is not contained in any written laws, but the constitution must be administered in accordance with law, that is, not only those specific laws and customs which go to make up the constitution itself, but the general laws of the land. This does not mean that those laws are not occasionally disregarded or infringed by those whose duty it is to administer the constitution, but that it is implied in the existence of the constitution that, if it is to have enduring effect, the laws are to be carried out and observed. If the Government were to tolerate a disregard of the law, the constitution itself would be in danger of ceasing to exist. And there are specific laws which are regarded as part of the constitution, the maintenance and observance of which, by reason of their importance for the liberty of the subject, are considered to be essential for the preservation of the constitution. These are the Petition of Right (1628) and the Habeas Corpus Act (1679), which are dealt with subsequently.

From the legality of the constitution we deduce its *impartiality*. If the laws underlying it are to be observed, they must be administered by those in authority without fear or favour, and in strict obedience to their precepts or provisions.

[1] Hannis Taylor, *loc. cit.*, p. 439.

Not only is there responsibility of the Cabinet to Parliament, but there is responsibility of all administrative officials to the ordinary law. The constitution insists upon the responsibility of all officials, from the highest to the lowest, to the ordinary law administered in the ordinary courts of the land.

Some writers have drawn attention to the *unitary* nature of the constitution.[1] The term, however, is used in several senses, which must be borne in mind. Great Britain is a unitary State, in so far as one king is its head. And the same person is, at the same time, King of the British Commonwealth of Nations or the British Empire, regarded as one whole. The King is, however, regarded also as the King of each separate Dominion. Nor are the acts of the King, as executive head of the State, necessarily acts done in and for each and every portion of the Empire. The King may, for example, sign an Order in Council which shall be effective for one part only of the Empire, and which neither is effective in nor has any relation to the other parts. The term is also applied to Great Britain in the legislative sense; and here it was appropriate so long as Great Britain and Ireland formed one united kingdom. It was then a legislative union, at the same time as it was (as it still is) under one Crown. But since the constitution of the Irish Free State this union no longer exists; and it is conceivable that Scotland, and even Wales, may in course of time become separate legislative States. It has been said that since 1801 there has been no independent legislature in the British Empire, and that this must be regarded as the ultimate and discriminating test; but this appears no longer to be the case (see Chapter II). It has also been said that the Empire as a whole is technically a unitary State. It is true that it is neither a confederation (*Staatenbund*), such as Germany was from 1815

[1] E.g. Marriott, *ubi sup.*, p. 16.

to 1866, nor a federal State (*Bundesstaat*), like the United States, or Germany from 1871 to 1918. But it is not unitary in the sense that the Union of South Africa, for example, is unitary. The different parts of the Empire have neither the same nor an equal voice in its Central Government; and they are not even directly represented in it. It would be more correct, in this connection, to speak of it as a "composite" State, the common link between its different parts being the Crown. As long as the Crown remains the common head, this State, which is neither confederate nor federal nor unitary, and which has no legislature common to all its parts, is nevertheless one indissoluble whole.

Just as Great Britain has no written constitution, so the British Commonwealth of Nations or British Empire, of which Great Britain is the centre, has no written constitution. The principles relating to it as an entirety have largely to be gathered from unwritten customs, practices, and conventions; although there is mention of the Empire, as such, in certain Acts of Parliament and in Orders in Council, and some conventions have been deliberately agreed upon by representatives of various portions of the Empire. The one thing which definitely marks the constitution of the Empire, unwritten though it be, is what proceeds from the very nature of the authority and prerogative of the Crown—the supremacy and sovereignty of the King over the whole of the Empire.

3. Constitutions of the Self-governing Dominions

It is not proposed to analyse the Dominion constitutions in detail, but merely to refer to certain general considerations which are applicable to all of them.

At one time it was thought that, just as an Englishman

carried the English law and British sovereignty with him to unoccupied territories where no system of law prevailed, so he carried with him the right to representative government. Both these notions, as Lord Courtney has shown, are erroneous.[1] It is not correct to say that British sovereignty is carried everywhere and for ever by British-born subjects. And it is a misuse of words, even now that self-government exists in so many of the British possessions, to say that British colonists carry with them the right to representative government. It has never arisen or been recognized as arising without express authority, even in Bermuda, where representative institutions were first introduced. In every case it has been directly set up by an Act of the British Parliament, or by Order in Council, which is ultimately referable to the sanction or authority of Parliament. It is true, however, that once representative government has been established in a colony, the legislature of that colony has, in more than one instance, been allowed or suffered to make provision for government by a Ministry, that is, responsible government; and from this has been derived the doctrine that, once responsible government has been set up, its recognition will not be withheld where fit conditions exist, though the direct authority of the Home Parliament is usually invoked.

Responsible government, as an institution, came into vogue at a comparatively late date in the history of the British colonies. This, however, is not remarkable, when it is remembered that it was only in the latter half of the eighteenth century that Cabinet government, as we now know it, came into existence in England itself. It was the loss of the American colonies that may be said to have led to the institution of representative government in a more effective form than had

[1] Courtney, *ubi sup.*, pp. 269, 270.

hitherto been known—that is to say, with greater local freedom especially in the sphere of taxation. The first measure of the kind was the Constitutional Act of 1791, whereby Canada was divided into Upper and Lower Canada, and separate legislatures were created for the two Provinces, each having a Legislative Council and an Assembly. Roughly, English parliamentary principles were to prevail. The legislature was to meet at least once in every twelve months. The duration of the Assembly was not to exceed four years. The Legislative Council was nominated by the Crown, and the House of Assembly was to be elected by the people. The Governor or Lieutenant-Governor might give or withhold his assent to Bills, or reserve them until the pleasure of the Crown should be made known. After the Governor had signified his assent, Bills might still be disallowed within two years of their receipt in England.

These provisions formed the model for the subsequent grant of representative institutions in other colonies. They still remain the basis of parliamentary institutions in the Dominions, though in certain cases the upper House of the legislature is elective as well as the lower.

It was in Canada, again, that the experiment was made of introducing responsible government. This is not surprising, as Canada was the only colony with a sufficiently large European population to warrant such a change. The experiment was tried in accordance with and in consequence of Lord Durham's Report, made by him as Special Commissioner to inquire into the causes of the rebellion of 1837. He advised that the Cabinet system must be introduced into the colonial constitution, that the Ministers must be responsible to the local legislature, and that the Governor, acting in all matters of merely local interest on their advice, must accept the position

of a "constitutional" ruler.[1] It was not, however, immediately that responsible government, as it is now understood, came into being. First of all, the Imperial Parliament passed an Act (1841) reuniting Upper and Lower Canada. Then, the Governor (Lord Sydenham) appointed what was known as a "Ministry," consisting of his own nominees, "which he intended to be a coalition between the two English parties; the French remaining for the present out in the cold."[2] The Governor took the view that, as he could not get rid of his responsibility to the Home Government, he would place no responsibility on the council or "Ministry." They were *a council* for him to consult, and nothing more. In the circumstances, disputes arose between the Governor and the colonists, and the problem was not settled until the time of Lord Elgin, who became Governor-General in 1847. The principle was then admitted that responsible government means government by a Cabinet Ministry commanding the support of and answerable to Parliament—in other words, party government by means of a Ministry.

The dates when responsible government was granted in the various colonies are—Canada, nominally 1841, really 1848; Nova Scotia, 1848; New Brunswick, 1848; Newfoundland, 1855; New South Wales, 1855; Victoria, 1855; Tasmania, 1856; New Zealand, 1856; South Australia, 1856; Queensland, 1859; Manitoba, 1870; British Columbia, 1871; Cape of Good Hope, 1872; Prince Edward Island, 1873; Western Australia, 1890; Natal, 1893; Alberta, 1905; Saskatchewan, 1905; Transvaal, 1906; Orange River Colony, 1907; Irish Free State, 1920; Northern Ireland, 1920. The

[1] Marriott, p. 317; Egerton, *Canada*, pp. 145–53; Cockburn, *Political Annals*, chaps. vii, viii.

[2] Egerton, p. 171.

Government of Ireland Act, 1920, was not, however, accepted by the Irish Free State, and the government of that Dominion was only inaugurated after the passing of the Irish Free State (Agreement) Act, 1922.

It will be seen, in certain of the foregoing cases, that responsible government was granted where the territory and the population were relatively small. This was due to local conditions, and also, in the case of the Canadian Provinces, to the fact that the grant of responsible government was "in fashion." Historians are agreed that in certain instances, such as that of Queensland, the state of development of the territory did not warrant the grant of responsible government at the time it was made.

It is important, however, to notice that as early as 1849 the Report of the British Board of Trade to Earl Grey (then Colonial Secretary) recommended that the Councils of the various Australian colonies should be allowed to draw up their own constitutions and submit them to the British Government for approval. This was carried into effect; and the example was followed in the Cape Colony, where, however, representative government only was introduced in 1853.

In most of the cases mentioned, as has been indicated, the grant of responsible government meant merely the engrafting of a Cabinet system upon a pre-existing parliamentary system, which continued to exist in its main outlines. In a few cases, however, such as Alberta and Saskatchewan, the grant of responsible government coincided with the inauguration of Parliaments. This was inevitable, as these provinces were formed after the creation of the Dominion, and forthwith, by reason of their status as provinces, obtained representation in the Dominion Parliament as well as separate existence as provinces.

The next stage in the history of colonies with responsible government was the union of certain groups of them by the creation of one Central Government and legislature, having power to deal with affairs of common interest, such powers being either plenary, that is, relating to all possible subjects of government and legislation, or restricted to certain defined matters. The reasons for the union were, in each case, contiguity of the constituent colonies, mutual interests, and convenience. There were three of these groups—the Canadian, the Australian, and the South African. They form the Dominion of Canada (under the British North America Act, 1867), the Commonwealth of Australia (under the Commonwealth of Australia Constitution Act, 1900), and the Union of South Africa (under the South Africa Act, 1909). New Zealand, though not a group, has also become a Dominion by Royal proclamation. The constitution of New Zealand is contained in the New Zealand Constitution Act, 1852. Newfoundland was admitted to the Imperial Conferences with the Dominions. It received its constitution in 1855. It is, however, "technically a colony rather than a Dominion, and the fact that she was not given a separate place in the Peace Conference and in the League of Nations marks her as definitely inferior in status to the Dominions" (Hall, *British Commonwealth*, p. 253).

Thus, the constitution of the Parliament of each of the self-governing Dominions, Canada, Australia, New Zealand, and South Africa, is a statutory constitution. The constitution of the British Parliament, on the other hand, is non-statutory.

At the same time, the constitutions of the Dominions are not entirely written. They depend also on customs and conventions. For example, the King is the head of each of the Dominions; but nothing is said in any of these constitutions about the title or the succession to the Crown, and it is tacitly

assumed that these matters are governed by English law. Again, these constitutions make no provision with regard to the right of a Governor-General to refuse a dissolution of Parliament on the advice of Ministers, a matter which has been a fruitful source of dispute in the Dominions. The rules on this subject must be gathered from practice and convention. Generally, also, the powers and functions of a Governor-General have to be sought in the terms of his Commission and Instructions, which form no part of the statute constituting the Dominion.

The fact that many of the rules relating to government are found in established customs and practice indicates that though the terms of the written constitutions must be observed, the general body of constitutional law in the Dominions, as in Great Britain, is subject to gradual change, even if there are not as much scope and freedom for alteration as exist under the British constitution. On the whole, however, change under the existing Dominion constitutions must be of a limited nature. We have the paradox of a country with an entirely flexible and unwritten constitution making grants of written constitutions, which are rigid or nearly rigid; though, but for the doctrine that a constitution once granted cannot be recalled, it would be possible for the British Parliament to repeal these constitutions and to replace them by constitutions of an entirely different type. Owing to the circumstance that the Dominions owed their constitutions to a legislative grant from the British Parliament, and that, according to the Colonial Laws Validity Act (1865), their Parliaments might not pass legislation in conflict with that of the British Parliament, their legislatures were termed "subordinate." It is, however, doubtful whether they can still be thus described, in view of recent developments in regard to their status (see Chapter II).

The Dominion constitutions differ considerably in their nature. They have been loosely described as "great federal communities."[1] Although many persons used the terms "federal" and "confederate" as interchangeable, the term "federal" has a definite constitutional meaning, which should be constantly borne in mind. According to this, a federal State is an aggregate of smaller States which, while retaining each its separate identity, are united together for defined common purposes in a union which, theoretically at least, is indissoluble. A unitary State consists, on the other hand, in an aggregation of smaller States which have merged their separate identities in a larger union which thenceforward forms one indissoluble whole. The United States are thus a federal country, whereas South Africa is a unitary state, as were Great Britain and Ireland before the separation of Ireland. Australia has followed the example of the United States, the powers of the Central or Federal Government being clearly defined, whilst the residue of undefined powers remains with the constitutional States. Canada, on the other hand, is partly federal and partly unitary, the powers of the constituent provinces being clearly defined, whilst the residue of undefined powers belongs to the central authority. While South Africa is mainly unitary, because its central legislature has full power to make any laws, there are federal traces in the fact that certain powers are entrusted to the Provincial Councils, which, however, have no legislative independence, that each province of the Union possesses an equality of representation in the Senate, and that, until new legislation is passed, each province retains its existing electoral franchise.[2]

An authoritative interpretation of the term "federal" in its

[1] See Halsbury, *ubi sup.*, sec. 881, p. 519.
[2] See my *South African Commonwealth*, pp. 6–9.

constitutional sense has been given by the Judicial Committee of the Privy Council, which laid down that the principle of the constitution of the Commonwealth of Australia, embodied in the Act of 1900, is federal in the strict sense of the term, namely, in that the federating States, while agreeing to a delegation of part of their powers to a common Government, preserved in other respects their individual constitutions unaltered.[1] In delivering the judgment of the Judicial Committee, Lord Haldane referred to the Canadian constitution, saying: "The British North America Act, 1867, departs widely from the true federal model adopted in the constitution of the United States, the tenth amendment to which declares that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to their people. Of the Canadian constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the ten provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties, both derived from the Act of the Imperial Parliament which was their legal source." He continued: "In a loose sense the word 'federal' may be used (as it is used in the British North America Act of 1867) to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to an entirely new constitution, even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitution. . . . In

[1] *A.-G. for Commonwealth* v. *Colonial Sugar Refining Co.*, (1914) A.C. 237.

fashioning the constitution of the Commonwealth of Australia, the principle established by the United States was adopted in preference to that chosen by Canada."

We have seen that the self-governing colonies had, as a rule, power to alter the constitution granted to them by the Act of the Imperial Parliament or by Order in Council—save, of course, in certain fundamental matters, such as subjection to the Crown and the administration of the colony by the Governor or Governor-General in the name and on behalf of the King. This power of alteration was claimed by Colonial Parliaments, and generally conceded by the Colonial Laws Validity Act (1865).[1] An instance of such alteration is the passing by the Cape Parliament of the Responsible Government Act (No. 1, 1872). The power of the Dominion Parliaments to alter their constitutions, as previously stated, is more doubtful—at least, in the case of Canada. In Australia it is hedged with safeguards, while in South Africa amendments of the constitution may, as a rule, be made in the same way as ordinary legislation, with certain definite exceptions. These exceptions are:—

(1) As to provisions for the operation of which a definite time is prescribed, which may not be altered within that period; (2) as to (*a*) the mode in which the South Africa Act may be amended; (*b*) increase in the total number of members of the Assembly, or diminution in the number of members representing an original Province of the Union, until the number of Assembly members reaches 150, or until the lapse of ten years from establishment of the Union, whichever is the longer period; (*c*) disqualification, on grounds of race or colour only, of persons qualified to be registered as voters in the Province of the Cape of Good Hope; (*d*) alteration in the

[1] See Curtis, *The Problem of the Commonwealth* (1918), p. 47.

provisions for equality of English and Dutch as official languages—any Bill for the repeal or alteration of any of these matters requiring to be passed by both Houses of Parliament (Senate and Assembly) sitting together, a two-thirds majority of the total number of members being requisite at the third reading.[1]

A constitutional amendment cannot abrogate the powers of the Crown. It was laid down by the Judicial Committee of the Privy Council *In re the Initiative and Referendum Act*,[2] that section 92 of the British North America Act, 1867, which empowers a provincial legislature to amend the constitution of the province "excepting as regards the office of Lieutenant-Governor," excludes the making of a law which abrogates any power which the Crown possesses through the Lieutenant-Governor, who directly represents the Crown.

It should be noted that the propriety or impropriety of passing an Act of Parliament in a colony or Dominion cannot be questioned on appeal to the King in Council; and the courts have no check on the legislation of a Dominion Parliament, except that they may refuse to give effect to it under the provisions of the Colonial Laws Validity Act, as long as that Act remains unaltered. In other respects, the Parliament is the sole judge of what may be for "the peace, order, and good government" of the Dominion, and no court has power to determine this. All that a court may do is to construe an Act as passed. But it cannot decline to accord it recognition on the ground that it has no statutory effect, unless it finds that it has not in fact been promulgated (i.e. published) as an Act of Parliament.[3]

[1] South Africa Act (1909), secs. 133, 152. [2] (1919) A.C. 935.

[3] *Riel* v. *The Queen*, 10 A.C. 675; *Tilonko* v. *A.-G. of Natal*, (1907) A.C. 93, 461.

CHAPTER II

THE STATUS OF THE SELF-GOVERNING DOMINIONS

A. Growth of "Dominion Status"

The Dominions, or the resultant groups of Dominions, which had obtained the grant of responsible government, and were spoken of as "self-governing," were autonomous only with regard to their internal affairs. As to foreign and extra-territorial matters they had no say—hardly even a voice. Matters of war and peace were determined by the Government of Great Britain; and so were all foreign and external relations. It was true that certain Dominions entered into conventions with foreign countries relating to various subjects, such as international copyright and the postal union; but these conventions required the approval of the Home Government, signified in one way or another, in order to render them internationally effective. Even in their own internal affairs the Dominions were not completely independent. The constitutions of all of them required, and in fact still require, the reservation of certain Bills for the signification of the Royal assent. The existence of the Judicial Committee of the Privy Council as the final Court of Appeal for the Empire is regarded in various quarters as a mark of subjection to what is called "Imperial supremacy," that is, the overriding authority of the British Government or the British Legislature; and several authorities of eminence have lent their weight to this view.[1] It has been said that "it is obviously absurd to declare

[1] E.g. Professor A. B. Keith, in art. on "Inter-Imperial Relations," *Outlook*, February 5, 1927.

that Canada is autonomous and an equal member of the British Commonwealth of Nations, and at the same time to hold that the courts of the Dominion are unfit to do justice to an unfortunate lady who has an accident whilst seeking to enter a Canadian railway station, to take one of the issues recently decided by the Privy Council, overruling the Dominion courts."[1] It does not, however, seem to follow that the existence of the Judicial Committee constitutes a derogation from the autonomy of the Dominions. The Judicial Committee is a court of appeal for the Empire or Commonwealth of Nations as a whole, as distinguished from Great Britain, with regard to whose courts it does not sit in appeal, except in certain cases which are relics of the ancient jurisdiction of the Privy Council—namely, Admiralty appeals and appeals from the Ecclesiastical Courts. In so far as the Judicial Committee is a court of appeal for English cases, this places the Dominion courts on a level of equality with the English courts, from which an appeal lies to the same tribunal. The appeal to the Judicial Committee no more renders the Dominion courts "unfit to do justice" than the appeal from the English Court of Appeal to the House of Lords Court renders the Court of Appeal "unfit." The Judicial Committee, in other words, is simply the final court of resort for the whole Empire, and in this respect the courts from which appeals lie all stand on an equal footing. It is, however, true that the Judicial Committee is constituted and regulated by Acts of the Imperial Parliament. The reason for this, however, is purely historical, and this fact no more interferes with self-government in the Dominions than does the fact that the succession to the Crown, which is the head of each Dominion, is regulated by an Act of the Imperial Parliament.

[1] Professor A. B. Keith, in art. on "Inter-Imperial Relations," *Outlook*, February 5, 1927.

There are three rules operating as fetters upon complete self-government of and by the Dominions: (1) The rule laid down by Lord Mansfield in the leading case of *Campbell* v. *Hall*, that all British colonies whatever, being held of the Crown of the United Kingdom, are subject to the paramount authority of the Imperial Parliament.[1] (2) The rule that the jurisdiction of colonial legislatures is confined to the territories of their colonies respectively, which has been applied to the case of attempts to enact laws relating to offences committed in other countries.[2] (3) The principle established by the Colonial Laws Validity Act (1865), that "any colonial law repugnant to the provisions of any Act of (the British) Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy be void. But no colonial law shall be void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of such Act, order, or regulation; and no colonial law shall be void by reason only of any instructions with reference to such law, or the subject thereof, which may have been given to the Governor by His Majesty, by an instrument other than the letters patent or instrument authorizing him to assent to laws for the government of the colony" (28 & 29 Vict., c. 63, sec. 2). Shortly, this rule means that a colonial law must be read subject to any British Act (or orders or rules made thereunder) extending to the colony to which the law relates, the colonial law being void in so far as it conflicts with a British

[1] Cowp. 204; 20 State Tr. 304.
[2] *Macleod* v. *A.-G. for New South Wales*, (1891) A.C., 455.

Act; but a colonial law is only void if it conflicts with a British Act extending to the colony, and not if it merely conflicts with English law generally; and Royal instructions to the Governor with reference to a colonial law do not render that law void. The result of this rule is that both colonial courts and the Judicial Committee of the Privy Council may examine into the validity of colonial laws, in accordance with this rule. Another result of the Act is to preserve the right of the Imperial Legislature to legislate for a colony.[1] On the other hand, these rules are modified by the principle, judicially recognized since the grant of self-governing institutions, that "after a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom."[2]

Towards the end of the nineteenth century, after the experiment of responsible government had been tried for several years and it had become apparent that the colonies where it existed were fully capable of managing their internal affairs, the view was expressed in many quarters that it was desirable to formulate a plan for co-operation of Great Britain and the various self-governing colonies in matters affecting the Empire as a whole. Various suggestions were made, one of those which found most favour being for a scheme of Imperial federation. Before any plan could be adopted, however, it was necessary that the views of the various Governments should be expressed in some authoritative and responsible manner. The first Colonial Conference was held in London in 1887, but concerned itself mainly with the problem of an Empire customs union. For several years nothing of importance was

[1] Halsbury, *ubi sup.*, vol. x, sec. 915, p. 536.
[2] *Re Lord Bishop of Natal*, 3 Moo. P.C.N.S. 148.

done. Another Conference took place in 1897, which contented itself with the somewhat colourless resolution "that the present political relations between the United Kingdom and the self-governing colonies are generally satisfactory under the existing condition of things." The one important feature of these meetings was that they were attended by the Prime Ministers of the colonies concerned, who might be presumed to speak with authority on behalf of the communities which they represented. The next Colonial Conference met in 1902, and the important resolution was taken that it would be to the advantage of the Empire if Conferences were held, so far as practicable, at intervals not exceeding four years, "at which questions of common interest, affecting the relations of the Mother Country and His Majesty's Dominions over the sea, could be discussed and considered as between the Secretary of State for the Colonies and the Prime Ministers of the self-governing colonies."[1] This settled the principle that such Conferences should be periodical. At the same Conference the suggestion (not a formal proposal) was made by the Colonial Secretary (Joseph Chamberlain) that there should be established a real Council of the Empire to which all questions of Imperial interest might be referred.[2] His successor in that office (Alfred Lyttelton), in a circular dispatch in anticipation of the next Conference, suggested that it might be well to discard the title of "Colonial Conference," which imperfectly expressed the facts, and to speak of these meetings in future as meetings of the "Imperial Council." It may be added that no formal "Council" has ever been agreed upon or constituted; and that the plan for federation has not merely not been adopted, but was subsequently rejected. The Lyttelton dispatch

[1] Egerton, *Origin and Growth of Eng. Colonies*, p. 184.
[2] *The British Empire* (Pollard), p. 768.

also suggested "a permanent Commission representing all the States concerned"; but this, also, did not meet with favour. Instead, a compromise proposed by the Canadian representatives was adopted, and the name of the Conference was ultimately changed to "Imperial Conference." This body, in any event, had no statutory powers; and it had no place in the constitutions of Great Britain and the self-governing colonies. In the strictest sense, its resolutions were not binding. Nevertheless, once such a resolution was taken, it constituted an undertaking that as far as lay within the power of those binding themselves to it, it would be given effect to, by legislative means or otherwise, in the part or parts of the Empire concerned. The taking of these resolutions has thus become a well-recognized practice, and, by a convention which has come into existence and has become part of the unwritten constitutional doctrine of the Empire, any such resolution has come to be regarded as binding if assented to by the Conference as a whole, even though it is not recognized or sanctioned by any formal law.

The next Colonial Conference took place in 1907, and at its meeting the resolution was formally taken to change its name. The resolution as finally agreed to (April 20, 1907) was as follows:—

"That it will be to the advantage of the Empire if a Conference, to be called the Imperial Conference, is held every four years, at which questions of common interest may be discussed and considered as between His Majesty's Government and the Governments of the self-governing Dominions beyond the seas. The Prime Minister of the United Kingdom will be *ex-officio* President, the Prime Ministers of the self-governing Dominions *ex-officio* members of the Conference. The Secretary of State for the Colonies will be an *ex-officio* member of the

Conference, and will take the chair in the absence of the President. He will arrange for such Imperial Conferences after communication with the Prime Ministers of the respective Dominions.

"Such other Ministers as the respective Governments may appoint will also be members of the Conference, it being understood that, except by special permission of the Conference, each discussion will be conducted by not more than two representatives from each Government, and that each Government will have only one vote.

"That it is desirable to establish a system by which the several Governments represented shall be kept informed during the periods between the Conferences in regard to matters which have been or may be subjects for discussion, by means of a permanent secretarial staff, charged, under the direction of the Secretary of State for the Colonies, with the duty of obtaining information for the use of the Conference, of attending to its resolutions, and of conducting correspondence on matters relating to its affairs.

"That upon matters of importance requiring consultation between two or more Governments which cannot conveniently be postponed until the next Conference, or involving subjects of a minor character or such as call for detailed considerations, subsidiary Conferences should be held between representatives of the Governments concerned specially chosen for the purpose." [1]

It will be noticed that the phrase "self-governing Dominions" was adopted. The Conference became a standing institution, no longer colonial, but Imperial. It became a Conference between Governments, and each Government was to vote as a single unit, with only a single vote, thus ensuring undivided responsi-

[1] *Minutes of the Conf. of 1907*, p. v.

bility for any resolution taken on behalf of the Government concerned. It may be added that, probably through accidental circumstances, such as war, "subsidiary Conferences" have not come into vogue. The secretarial staff has not been constituted as a separate body, but consists of officials of the Dominions Department, who act in connection with the Imperial Conferences from time to time, as occasion requires.

The next Conference, in accordance with the four-years rule, was held in 1911. Owing to the outbreak of the Great War (1914–18) no Imperial Conference took place in 1915, but in 1917 and 1918 the Conference was called the Imperial War Conference, and was held under the chairmanship of the Secretary of State for the Colonies. On the constitution of the Imperial War Cabinet, also, two Dominion Ministers were invited to attend it, and became members; and, in the eyes of many people, this foreshadowed great changes in formal Imperial relations; but the arrangement was only temporary, ending with the war, and never became permanent. Nevertheless, many saw in it the germ of a standing Imperial Cabinet; but the idea, as previously indicated, has not met with favour, more especially in the Dominions. In many quarters it is regarded as an application of the federal idea. In 1921 the Premiers' Conference, more or less informally constituted, but acting in the spirit of previous Imperial Conferences, discussed all matters of general interest to the British Commonwealth of Nations as a whole. Further Imperial Conferences were held in 1923 and 1926. In 1923 the decision was taken to summon the Conference, if possible, once in every three years.

The Imperial Conference may thus be said to have become a continuing institution. Its permanence is a matter for the future, the probability being that just as the constitution of Great Britain and the constitutions of the Dominions reveal

a gradual progression or evolution, so this institution may in time either change into something else or acquire additional characteristics.

Perhaps the most important feature of these meetings was the habit of free and frank discussion of Imperial problems, which was accompanied by a growing consciousness that not only was each Dominion a self-contained unit, but that it had freedom of action in regard to its own affairs. This hardened into practice in the course of time, and became a well-recognized part of constitutional doctrine, as above stated, without the passing of any laws to give it formal expression.

One thing which had become clear, owing to historical incidents which hardened into accepted practice, was that the self-governing Dominions would not tolerate any interference by the Home Government in their internal affairs; and this position had been ultimately acquiesced in by the Colonial Office, although it was not until the Imperial Conference of 1926 that formal expression was given to this view of the relations between the British Government and the Dominions.

The last instance of attempted interference had occurred in 1906, when the Natal Ministry tendered its resignation on the hint of intervention by Lord Elgin, the Colonial Secretary, in the matter of the execution of the ringleaders in the Zululand Rebellion during that year, a matter which the Natal Government regarded as purely domestic. Lord Elgin did not persist in his attitude.

It was felt in many quarters that some definite principles must either be adopted or clearly understood and tacitly assented to with regard to the relations binding the Mother Country and the Dominions—it being assumed, in any event, that the Crown was the connecting link between them. That in most, if not all, cases a sentimental bond existed between

them was clear; though that was different from a constitutional doctrine according to and from which the rights and powers of the Dominions might be deduced. There were those, on the one hand, who dwelt upon the fact that, though no such doctrine had been formulated or even accepted, the sentimental tie was strong enough to induce the Dominions to stand freely and voluntarily by the Mother Country when she was in danger; while there were others who, fully recognizing the strength of that tie, nevertheless thought that the time was ripe for a formal declaration or convention in regard to the constitutional position of the Dominions. Such opinions naturally came to be uttered on the occasion of the participation of the Dominions, as constituting parts of the Empire, in the Great War, which formed the occasion for testing its solidarity and its strength. On the one hand, Sir Clifford Sifton, in his speech at the Canadian Club, Montreal (January 25, 1915), said: "Bound by no constitution, bound by no rule of law, equity, or obligation, Canada has decided as a nation to make war"—that is, on the British side. The addition of the words "equity or obligation" may, perhaps, be regarded as rhetorical. What was clearly intended was that Canada was not bound to enter into the war by virtue of any constitutional or legal principle. The other point of view was voiced by Mr. Andrew Fisher, then High Commissioner for the Australian Commonwealth, in a speech (January 30, 1916): "I went to Australia. I have been Prime Minister. But all the time I have had no say whatever about Imperial policy—no say whatever." And Mr. Lionel Curtis, in his book on *The Problem of the Commonwealth*,[1] expressed the feeling which was growing in certain quarters that before long there must be some pronouncement regarding the right of the Dominions to have a voice in foreign affairs:

[1] 1916, p. 17.

"An electorate may control some departments of government, but not others, and in that case they can only achieve responsible government by insisting that all their public affairs shall be regulated by Ministers dependent on their votes. The people of a Dominion are a case in point. They elect the Parliament which regulates their domestic affairs, but not the Parliament which regulates their foreign affairs. In order to achieve responsible government they must either elect members to both Parliaments or entrust the conduct of their foreign affairs to the Parliament they already elect." The term "responsible government" was used in the very widest sense, as embracing the right of the Dominions to regulate all their affairs, both internal and external.

The position at the time was that while the Dominions were practically autonomous, that is, self-governing, in internal matters, they were not recognized as having a voice in the management of foreign affairs, which were transacted on behalf of the whole Empire by the British Foreign Minister, who was responsible solely to the Imperial Parliament, and who was not bound to consult, and, in fact, very rarely did consult, the wishes or opinions of the Dominions. Nor had the Dominions any international recognition as self-governing States. And, as a matter of law, the Colonial Laws Validity Act remained in force, even though the occasions for its application were rare, and it was never invoked for the purpose of withholding from a Dominion any right to regulate its internal affairs. It was solely applied to determine the question whether a Dominion legislature had passed any particular law within the legislative limits assigned to it.

The participation of the Dominions in the Great War was the occasion for the recognition, not merely of the part they had played in aiding the British cause, but of their right to be

consulted in affairs which might affect them both from an Imperial and an international point of view. And it was felt that the participation of India as a whole, though not a self-governing Dominion, entitled that great possession to an equal voice. On this subject a pronouncement had been made by the Secretary of State (Edwin Montagu) in the House of Commons on August 20, 1917: "The policy of His Majesty's Government, with which the Government of India is in complete accord, is that of the increasing association of Indians in every branch of the administration, and the gradual development of self-governing institutions, with a view to the progressive realization of responsible government in India as an integral part of the British Empire." In the opinion of Professor Zimmern, this pronouncement "is a landmark in British Imperial history. It marks the definite repudiation of the idea that there can be, under the British flag, one form of constitutional evolution for the West and another for the East. . . . It is true that the pronouncement of August 1917 did no more than state a philosophy and a developing programme. India is not yet self-governing, and no date has yet been set for that consummation. But that the pronouncement is not simply an idle formula, but represents a genuine and active policy, is clear from the whole record of British Imperial policy since the war." [1] Professor Zimmern indicates that this announcement of intention with regard to India must be applicable to the other non-white British peoples also; but that is a matter of politics with which this work is not concerned. What is important is that the pronouncement with regard to the future status of India was an indication of the recognition which was, in fact, accorded to India, along with the self-governing Dominions, long before India had, in fact,

[1] *Ubi sup.*, pp. 13–14.

attained self-government. It has been indicated, previously, that India has been recognized as having Dominion status, although it does not enjoy responsible government.

Of greater importance, from a constitutional point of view, was the resolution passed at the Imperial Conference of 1917, that any readjustment of constitutional relations, "while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same; should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations; and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine." [1]

In this resolution lay the germ of the participation of the Dominions and India in the peace negotiation at Paris, which resulted in the signature by them, along with the other participating States, of the Treaty of Versailles on June 28, 1919—the first occasion on which the Dominions had, with the assent of foreign States and the acquiescence of the British Government, assumed a status in international affairs. We are told that in the representation at the Peace Conference, Canada took the lead, which was followed by the other Dominions.[2]

This participation of the Dominions in the signature of the Treaty of Versailles is a cardinal instance of the important part actual practice—the *fait accompli*—plays in the develop-

[1] Quoted by Professor Zimmern, *ubi sup.*, p. 29; *Annual Register*, p. 117, May 3, 1917.

[2] Zimmern, *ubi sup.*

ment of constitutional and even international relations. No Act of any Parliament had been passed authorizing any Dominion representatives to sign. It may be that had such legislative sanction been sought it would not have been accorded. No inter-Imperial convention had been agreed upon in regard to the matter. Nevertheless, the fact remained; and it immediately had its effect upon the position of the Dominions as regarded their status both within and outside of the Empire. At the same time, apart from the indication of what their representatives could do, in a *de facto* sense, there was no legal change of any kind. And India was a co-signatory, though not self-governing. The mere fact of signature of the Treaty did not convert the Dominions into "autonomous nations." The recognition of their position as such, in accordance with the resolution of the Imperial Conference above referred to, still awaited fulfilment.

Although only a temporary measure arising out of the War, and not affecting the permanent constitutional position, it is of interest to notice that in 1918 it was stated, as a result of the meetings of the Imperial War Cabinet, that "these meetings have proved of such value that the Imperial War Cabinet have thought it essential that certain modifications should be made in the existing channels of communication, so as to make consultation between the various Governments of the Empire in regard to Imperial policy as continuous and intimate as possible. It has therefore been decided that for the future the Prime Ministers of the Dominions, as members of the Imperial War Cabinet, shall have the right to communicate on matters of Cabinet importance direct with the Prime Minister of the United Kingdom whenever they think fit to do so." [1] It is probable that out of these consultations grew an understanding,

[1] *Annual Register*, 1918, p. 148.

if not agreement, that the Dominions should participate in the Peace Treaty.

In spite of the fact that the representatives of the Dominions were invited to sign the Treaty of Versailles in 1919, there was nothing in the shape of a formal declaration that they had assumed the position of independent international States. Nevertheless, the mere fact that they were signatories to the Treaty was taken in many quarters, and by highly placed politicians, as an indication that the Dominions had attained to this independent status. Stress was also laid on the fact that certain of the Dominions, Australia, New Zealand, and South Africa, were entrusted with mandates under the League of Nations Covenant, for whose administration they were responsible directly, and not through the medium of Great Britain, to the Permanent Mandates Commission of the League. On the other hand, notice must be taken in the first place of the circumstance that the Treaty of Peace was signed on behalf of "the King of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India," and thereafter followed the signatures of the separate representatives of the four self-governing Dominions and of India. But it could not be contended that because the self-governing Dominions signed equally and at the same time with India, the Dominions were thereby given any status differing from that of India. Clearly, India is not a self-governing Dominion, and it could not be contended that India received a new status by the fact that the Treaty was signed on her behalf—even assuming India to be one homogeneous and self-contained Government. In the next place, the Covenant of the League takes care to differentiate between States and Dominions, going so far as to provide for the inclusion of colonies, for it declares, in its first article, that "any fully self-governing State, Dominion

or Colony not named in the Annex may become a member of the League" on certain conditions. This assumes that the Dominion or colony is fully self-governing at the time of its adhesion to the Covenant, and it does not become self-governing or acquire a fresh status by reason of such adhesion.

Previously, at the Imperial War Conference of 1917, General Smuts, then a member of the Imperial War Cabinet, had said: "Whatever we may say, and whatever we may think, we are subject provinces of Great Britain. That is the actual theory of the constitution, and in many ways which I need not specify that theory still permeates practice to some extent. I think that is one of the most important matters that will have to be dealt with when this question of our future constitutional relations on a better and more permanent basis comes to be considered. The status of the Dominions, as equal nations of the Empire, will have to be recognized to a very large extent."

Even after the Treaty had been signed, Lord Milner, then Colonial Secretary, said in a speech in the House of Lords (July 9, 1919): "The only possibility of a continuance of the British Empire is on a basis of absolute out-and-out equal partnership between the United Kingdom and the Dominions. I say that without any kind of reservation whatever. It is very easy to say that; but undoubtedly the working out of it in practice, without bringing about the severance of relations between us and the Dominions, will be one of the most complicated tasks which statesmanship has ever had to face."

It was a fact, nevertheless, that the Dominions had been received as co-signatories of the Treaty. Whatever the effect of this was, the foreign States which signed the Treaty could not thereby confer any constitutional status on the Dominions, for with the internal constitutional relations between the Dominions and Great Britain they had no concern, and no

right to interfere. All that mattered to them was that Great Britain had acquiesced in, or permitted the signature of, the Treaty by the Dominions.

What had happened induced General Smuts to say in a farewell message on leaving England in July 1919: "The Dominions have been well launched on their great career; their status of complete nationhood has now received international recognition, and as members of the Britannic League they will henceforth go forward on terms of equal brotherhood with the other nations on the great paths of the world." The phrase "Britannic League" was apparently used by way of analogy to the League of Nations, but it is, in fact, unknown in constitutional usage.

Lord Milner, also, made a subsequent declaration that "the United Kingdom and the Dominions are partner nations; not yet indeed of equal power, but for good and all of equal status." And Dr. A. B. Keith, a recognized constitutional authority, has written: "The Dominions thus emerged as possessed of a diplomatic status of a completely new kind, being autonomous members of an Empire." [1] The suggestion here is capable of the construction that the Dominions had become autonomous members of a federal State, each of which had received international recognition. The statement, however, embodies nothing more than the expressions of General Smuts and Lord Milner to which reference has just been made.

In many quarters, however, doubts were expressed as to whether the mere signature of the Treaty had altered the constitutional position of the Dominions. In the course of a debate in the South African House of Assembly, General Smuts stated: "We have received a position of absolute equality and freedom, not only among the other States of the

[1] *Dominion Home Rule in Practice*, p. 37.

Empire, but among the other nations of the world." In reply to this, Mr. Tielman Roos, a member of the Opposition (subsequently Minister of Justice) said that "nothing had happened to change the relations of the different Dominions to the United Kingdom, and all these fine-sounding phrases were meaningless." The view generally taken was that there must be either a formal declaration, authoritatively made, or that a convention must be established or entered into, which might be regarded as binding upon Great Britain and the Dominions. Not long afterwards, Mr. H. Duncan Hall, in his work on *The British Commonwealth of Nations* (1920), wrote: "The time is, therefore, ripe for a formal, general, and authoritative declaration of constitutional right by the one body which can satisfactorily make it, namely, a special constituent Imperial Conference." [1] It is not clear what is meant by a "special constituent" Conference. If the members of such a Conference had to receive a direct mandate in advance from their respective legislatures, there would be many difficulties in the way, and a very long time might elapse before agreement would be arrived at. Such a procedure would not appear to be necessary, for declarations by members of an ordinary Imperial Conference have, as we have seen, been accepted as declaratory of constitutional right, and, when acted upon, have hardened into constitutional practice. Mr. Hall's statement, however, fully supports the view that some authoritative declaration was necessary.[2]

Owing to events that had taken place on the Continent of

[1] P. 236.

[2] So also Mr. Eggleston, a well-known Australian publicist, wrote in *The Quarterly Review* (vol. 235, p. 296): "So far, General Smuts has been talking rather than acting. He himself confesses that his theory involves a considerable alteration in the machinery of the Imperial system. No steps have yet been taken to bring about such an alteration." See also Egerton, *Brit. Colonial Policy in the Twentieth Century*, pp. 164–5.

Europe, the Imperial Conference of 1923 was concerned, in the main, with foreign affairs and economic problems. Nevertheless, the treaty-making rights of the Dominions, which had considerable bearing on their status as countries with international rights and powers, were the subject of consideration. By resolution, the Conference declared it to be "the now established practice" that on any British Empire delegation which took part in the negotiation of international treaties, the Dominions and India should be separately represented. By the same resolution, each Dominion was accorded the right of concluding independent treaties on matters which concerned itself only, subject only to the granting of a "full power" to its representative by the Home Government. According to a writer in *The Annual Register*, the principle that the Empire was now a commonwealth of equal and independent partners, and that authority in it was no longer centralized in London, was affirmed even more decisively by the resolutions on defence, one of which expressly recognized that it was for the Parliaments of the several parts of the Empire, upon the recommendations of their respective Governments, to decide the nature and extent of any action which should be taken by them in this field. The Conference further laid down the primary responsibility of each portion of the Empire represented at the Conference for its own local defence.[1] The principle was thus laid down that it was the right of each Dominion to decide for itself the extent of its own participation in Imperial defence, apart from the regulation of its own local defence. Nevertheless, treaties could still only be made by Dominion representatives who held a "full power" from the Imperial Government, which, while taking no actual part in the negotiation of a treaty between a single Dominion and

[1] *Annual Register*, 1923, p. 130.

another State, thus set the seal of its approval upon the treaty. It could not thus be said that a Dominion had an absolutely unrestricted and unfettered right to make a foreign treaty.

Nevertheless, whether in actual practice or by formal declaration, important principles had been laid down at the Conferences up to 1923 with regard to the increased power, which carried with it enhanced even if not entirely independent status, of the Dominions.

To attain what in effect amounted to an independent status, a formal, general declaration was necessary, together with provision for the working machinery to give effect to it. This machinery need not involve a new constitution, but it clearly entailed alteration in laws which had a hampering effect on the administrative or legislative activities of the Dominions.

In anticipation of administrative changes that might be rendered necessary on account of the new orientation of policy and principle with regard to the powers and status of the self-governing Dominions, Mr. Baldwin, the British Prime Minister, announced in Parliament (June 11, 1925) that the Government contemplated the creation of a new Secretaryship of State for Dominion Affairs, with its own Parliamentary Under-Secretary of State, who would also act as Chairman of the Overseas Settlement Committee. This constitutional change, it was said, was in reality somewhat overdue, as, since the time when the colonies had grown into self-governing Dominions, their relation to the Home Government had become completely different from that of the Crown colonies and protectorates, and they required to be dealt with separately. The change thus announced has not as yet been brought into full operation. It has been remarked that, having made his announcement, Mr. Baldwin at once proceeded to nullify the first half of it, for the time being at any rate, by stating that

"for reasons of practical convenience" the new Secretaryship of State would continue to be vested in the present Secretary of State for the Colonies, and the new department to be housed at the Colonial Office.[1]

This new administrative policy was further enlarged upon by the Colonial Secretary, Mr. Amery, later on in the same session. On July 27, 1925, he said that the creation of a new Secretaryship of State for the Dominions was a recognition of the profound transformation which the structure of the Empire had undergone in the last generation, and the emergence of the young nations of the British Commonwealth. The new Office would be constituted entirely separate from the Colonial Office, and would submit separate estimates.[2]

In view of the declarations that had already been made, it was felt that the Imperial Conference of 1926, when there were no distracting foreign occurrences to monopolize attention, would afford an opportunity for a full consideration of the position, and the making of the necessary declarations and statements of future policy in regard to the "status question." It was announced by Mr. Mackenzie King, the Canadian Premier, and General Hertzog, the South African Premier, that the securing of a definite agreement on these points was their main object in attending the Conference. In anticipation of the results of the Conference, General Hertzog, before leaving South Africa to attend it, said: "Something more will be received from Great Britain and the Dominions than a mere declaration of constitutional rights among themselves. That declaration will have to be formally communicated by them to the outside world."

The Conference assembled on October 19, 1926, and the consideration of the problem of "Dominion status" was

[1] *Annual Register*, 1925, p. 62.

[2] *Ibid.*, p. 82.

referred to a special committee, consisting of the Prime Ministers of the Empire, together with the representatives of India, and presided over by Lord Balfour, a former Prime Minister and Foreign Secretary. This committee issued its Report on Inter-Imperial Relations on November 20th, which was unanimous. This Report was accepted by the Conference as constituting the basis of those relations in the future, and thus constitutes a landmark, perhaps the greatest, in the history of the subject. In many quarters it has been described as a new "Magna Charta." Its effect, however, has been not to confer liberty on the individual, which was the consequence of Magna Charta and the other great epoch-making statutes, such as the Habeas Corpus Act, but to confer liberty on the Dominions as units of and within the British Commonwealth of Nations. Accepted by the Imperial Conference, it constitutes a convention or compact which, though legislative effect has to be given to various details, is nevertheless to be regarded as binding in a constitutional sense.

Before treating of the Report in detail, it is desirable to advert briefly to the statement which has been made in various quarters, that the Report establishes "nothing new," and that in essence complete liberty of action had previously been accorded to the Dominions. Apart from a comparison of the recommendations of the Report with pre-existing constitutional and legal rules, it is of interest to notice the testimony of those who participated in drafting the Report. One of the critics is Professor Keith, who says: "We are told that the Dominions are equal in status to the United Kingdom and in no way subordinate to it, though united by a common allegiance and freely associated as members of the British Commonwealth of Nations. . . . The Conference, when it came to deal with the issues involved, showed itself unable to arrive at

any conclusions extending the autonomy of the Dominions beyond that already achieved. . . . The actual concessions made were essentially subsidiary, recognition or slight extension being accorded to principles already in normal operation. . . . The Report points to a slow evolution, and makes no substantial breach with the present."[1] On the other hand, Mr. Bruce, the Australian Premier, says: "The pre-war conception of the Empire was a simple one. The Dominions were amply satisfied with the unfettered self-government which they enjoyed in the domestic sphere, and were content to allow Great Britain to conduct their foreign policy on her own responsibility and by her own efforts. But common consultation for the prosecution of the war, followed by the novel method employed in signing the Treaty of Versailles, together with the separate membership of the League of Nations which was accorded to the Dominions, and their fresh rights in the diplomatic field, made it clear that the pre-war conception had gone for ever. . . . The implications of Dominion nationality demanded an extension of self-government. After the war this extension came piecemeal in this direction and in that, to meet certain difficulties as they arose. But the position as a whole was not clarified, and it fell out that the work of clarification devolved upon the shoulders of the recent Conference. . . . We had to establish clearly the fact of the full autonomy of the Dominions in respect to every particular issue that was raised, and we had to do this on a basis which left the essential unity of the British Commonwealth unimpaired in any way. . . . In every single case the reconciliation between freedom and unity has been achieved in such a way that there is no further room for doubt among men of good will about what the British Empire means, and how in practice it may be

[1] Art. in *The Outlook*, February 5, 1927, pp. 144, 145.

expected to conduct its affairs. . . . We know now where we stand as an Empire. Each part can rely upon a genuine belief of all in the Imperial bond, and each knows that this close union implies no derogation from its own sovereign status." [1] In brief, Mr. Bruce's view is that a declaration was made of full autonomy, while at the same time the essential unity of the British Commonwealth was left unimpaired. In addition, the Report stated "what the British Empire means," that is, the constitutional principles applicable to it generally, apart from the detailed "conduct of its affairs." Speaking at Pretoria on December 20, 1926, General Hertzog said: "South Africa, so it is declared here, is free in its self-government inside as well as outside, and the degree and nature of that self-government is equal to that of England without any inferiority or reservation. . . . Commonwealth of Nations is the name for Great Britain and the Dominions in their free association under the Crown. . . . The British Empire is not a *status persona*, and possesses no authority or domination over the members or any member of the British Commonwealth of Nations. . . . The Empire group unit idea has been broken." Perhaps the most authoritative and weighty statement was that of Lord Balfour, in an address as Chancellor of Edinburgh University. He said that the whole community had been conscious after the issue of the Report of the Imperial Conference that somehow and in some respects an important movement had been reached in the evolution of the British Empire. "What was the change that had taken place?" people asked themselves, and the reply was not very obvious, because it had never been denied for many years that the Dominions were autonomous. The Empire in its present condition was

[1] Art. "The Conference and Dominion Status," *English Review*, December 1926; *Living Age*, January 15, 1927.

the result of an evolutionary process in which law had always lagged behind practice. It was all-important that when the Prime Ministers of the Dominions met together last November (1926) they should singly and severally in their collective capacity, as well as in their private capacity, give their authority to what we in this country (England) believed to be true—the doctrine of equality of status. Another thing which had never been formulated a few weeks or months ago was that while for all time the status of those autonomous members of the British Empire was identical, there was, and there must be, differentiation of function. Australia had a special function with regard to one of the mandatory territories. New Zealand had another special function with regard to another mandatory territory, and South Africa was responsible for the mandatory territory of (German) South-West Africa. The constitution was absolutely the only constitution possible for the British Empire as it existed. They need not argue whether it would not be better to have a central authority, or whether some means of coercion in extreme cases ought not to be contrived. All this constitution-mongering was utterly out of place when they were dealing with the national growth of the Empire, and when they remembered at the same time that the Empire was settled in fragments in every part of the habitable globe.[1]

B. The Report on Inter-Imperial Relations, 1926

It has been indicated that various proposals in the Report will require legislative action in order to make them effective. The Report as a whole, however, is to be regarded as a convention which becomes binding between the different portions of the Empire to which it relates, in the same way as a treaty

[1] Abridged from *The Times Weekly Edition*, February 3, 1927.

is binding. A treaty, it is true, often requires legislative sanction; but, once ratifications have been exchanged, each of the contracting parties is entitled to regard it as binding and operative. In the case of a general agreement between the representatives of Great Britain and the Dominions at an Imperial Conference, no such formalities are necessary. The practice has been to regard the assent of the representatives as sufficient, the assumption being that they bind their respective Governments and undertake to see that the necessary legislation is passed, or the requisite adaptations and modifications made in the constitutional machinery. "It may be claimed that, by virtue of its retention of the legal sovereignty of Parliament and of the legal unity of the Crown throughout the Empire, whilst finally emptying them of the last vestige of British supremacy, the method of securing equality of nationhood in the Empire by a general declaration of constitutional right is in complete accord with the spirit and tradition of the British constitution." [1]

I. Status of Great Britain and the Dominions.—The Report begins with the statement that nothing can be gained by attempting to lay down a constitution for the British Empire, in view of the different characteristics, histories, and stages of evolution of its various parts; while, as a whole, it defies classification and bears no real resemblance to any other political organization now existing or which has ever yet been tried.

On this it may be remarked that it was not the task of the Conference to frame a general constitution for the Empire. The Conference was not constituted or empowered for that purpose, and, as the Report states, such a step was not possible in the circumstances.

[1] Duncan Hall, *Brit. Commonwealth of Nations*, p. 232.

The Report then states that the position is different with regard to the group of self-governing communities composed of Great Britain and the Dominions, whose position and mutual relation may be readily defined.

They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

This is a declaration of status, not a constitution. The respective constitutions of Great Britain and the Dominions continue to exist, the declaration being super-added to them. It is a definition of the result which has been arrived at in the evolution of constitutional government in the self-governing parts of the Empire as a whole.

The elements of this definition are:—

(*a*) Autonomous communities. Each is self-governing.

(*b*) Communities within the British Empire. The Conference was not competent to lay down a declaration with regard to communities not belonging to the Empire. The basis of the declaration is that the self-governing communities associated with it through their representatives are, and continue to remain, part of the Empire as a whole.

(*c*) Equality in status. Each self-governing entity within the Empire stands on the same footing as the others. None is superior to the others, and, as the next clause makes clear, none is subordinate. Equality of status implies the right of each to settle its affairs for itself, bearing in mind the conditions of allegiance and membership of the British Commonwealth, and the right to be consulted in matters relating to the interests of the Empire as a whole.

(*d*) Absence of subordination. This is really explanatory of, and an enlargement upon, the doctrine of equality of status. If the self-governing parts are equal in status, they cannot be subordinate one to another. It is plain, however, that the intention is to state formally and authoritatively that the old notion of subjection to the supreme legislative power of the Imperial Parliament has disappeared. This power existed over the Empire as a whole, and still

exists over those parts of it which are not autonomous or self-governing. It no longer exists over the self-governing Dominions. In regard to Great Britain itself, there can in any event be no question of subordination, for the Imperial Parliament is at the same time the Parliament of Great Britain. There is no super-Parliament over the respective Parliaments of Great Britain and the self-governing Dominions as a whole.

As there is no subordination, each self-government has complete freedom of action in both domestic and external affairs. No authority can interfere with it in its internal government. Its external freedom is a consequence of its membership of the League of Nations, the result of which is recognition in an international sense, with the consequent power to have foreign representation and to enter into treaties—it being understood that membership of the British Commonwealth continues. On the question whether a self-governing Dominion is a completely international State, an opinion cannot readily be expressed. The probability is that, in an international sense, it cannot be regarded apart from its membership of the British Commonwealth, saving its rights as a member of the League of Nations.

(*e*) United by a common allegiance. The essence of the structure of the British Commonwealth of Nations is unity between its parts, though there is no formal unity in the sense of a federation, confederation, or unified government. The link of unity is the Crown, to which each and every unit of the Commonwealth owes allegiance. It is, consequently, a common allegiance. The allegiance is to the Crown, not to any other authority, such as the British Parliament.

(*f*) Free association. The implication here is that there is no coercion in the association. It is a voluntary association. Nor is there even the coercive effect of a formal or written constitution of the Commonwealth of Nations as a whole. Such a constitution, though it might be voluntarily entered into, would nevertheless be binding upon, and thus coercive of, the parties to it.

(*g*) Members of the British Commonwealth of Nations. It is only as members of the Commonwealth that Great Britain and the Dominions have entered, and can enter, into this association. The association, though there is no formal constitution, forms the British Commonwealth, which, however, embraces in addition those portions of the Empire which are not self-governing, i.e. in

the sense that they have not attained to equality of "Dominion status."

After stating the historical and general considerations leading up to the foregoing definition, the Report proceeds: "And though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled."

With the expression of opinion contained in the foregoing passage this work is not concerned. The important statement is that every Dominion is the sole judge as to its co-operation, i.e. in the welfare and interests of the Empire as a whole. In that co-operation it is free to act for itself, and as it deems fit, without external pressure of any kind.

After repeating that "equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations," the Report states that "the principles of equality and similarity, appropriate to status, do not universally extend to function."

By "function," it is conceived, is here meant the working of the machinery of government. This must necessarily vary. This the Report explains by adducing the examples of diplomacy and defence. For this "flexible machinery" is required, which can from time to time be adapted to the changing circumstances of the world. These are not "immutable dogmas," such as the principles of equality and similarity are in relation to status. The remainder of the Report is to be devoted to the statement and the application of political theory to common needs—in other words, to the details of inter-Imperial relations.

II. Special Position of India.—The Report states that the reason for limiting the scope of the foregoing paragraphs to the self-governing Dominions, without mention of India, is that the position of India in the Empire is already defined

by the Government of India Act, 1919. It is, however, recalled that by Resolution IX of the Imperial War Conference, 1917, due recognition was given to the important position held by India in the British Commonwealth.

The position of India is dealt with separately (Chapter III).

III. Relations of the Various Parts of the Empire "inter se."—The Report examines existing administrative, legislative, and judicial forms, with special reference to any cases where the want of adaptation of practice to principle has caused, or might be thought to cause, inconvenience in the conduct of inter-Imperial relations.

(*a*) *The title of His Majesty the King.*—This is a matter of special importance and concern to all parts of His Majesty's Dominions. The Royal Title has been altered twice within the last fifty years to suit changed conditions and constitutional developments (i.e. on the assumption by Queen Victoria of the title "Empress of India" on January 1, 1877, and by the addition of the words "and of the British Dominions beyond the Seas" under the Royal Titles Act, 1901). Under the Act of 1901 the present title is: "George V, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India." This form does not accord with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It is recommended that the necessary legislative action be taken so that the title should read: "George V, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

Owing to representations made by the Government of Northern Ireland after the issue of the Report, the word "Northern" has

been inserted before "Ireland" in the title of the Imperial Parliament. As stated previously, an Act was passed in 1927 to give effect to the recommendations.

(*b*) *Position of Governor-General.*—The position held by the Governor-General as His Majesty's representative in a Dominion undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London, and acted also as their representative. In the opinion of the Committee, it is an essential consequence of the equalty of statius existing among the members of the British Commonwealth of Nations (i.e. the self-governing Dominions) that the Governor-General is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any department of that Government.

It seemed to the Committee to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and his Dominions might be regarded as no longer in accordance with the constitutional position of the Governor-General. The recognized official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had completed its work. It was recognized, as an essential feature of any change of development in the channels of

communication, that a Governor-General should be supplied with copies of all documents of importance, and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.

According to the Report, a Governor-General—

(1) is the representative of the Crown;

(2) holds the same position in a Dominion relating to the administration of public affairs as does the King in Great Britain;

(3) is not the representative or agent of the British Government;

(4) is not the representative or agent of any department of the British Government.

In future, official communications should be between Government and Government direct, i.e. between the British Government and a Dominion Government. It is no longer constitutional for the Governor-General to be the medium of communication. A Governor-General should be supplied with copies of important documents and informed of Cabinet business and public affairs in the same way as the King is in England.

Professor Keith attributes the statement that the position of a Governor-General is the same as that of the King in England to the situation created in June 1926, when Lord Byng of Vimy refused a dissolution to Mr. Mackenzie King, the Canadian Premier, which was "not merely a complete breach with Canadian precedent, but asserted for the Governor-General a personal initiative which was actually resented by the people of the Dominion. . . . This, of course, is a matter which in no way affects the Imperial relations, and the decision is one which has always been acted on in the Union of South Africa and has been adopted since 1914 in the Commonwealth (of Australia)." [1] It is, however, clear, as Professor Keith himself implies, that similar situations had arisen in Australia before, and the necessity for a general and binding rule is therefore apparent. Apart from this, the recommendation (which has now been accepted as regulating future constitutional practice) has a wider aspect. We have seen that "the King reigns but does not govern." That, for the future, is also the position of a Governor-General. The title "Viceroy" would more nearly describe the position, though it must not be forgotten that the title of Viceroy

[1] *The Outlook, ubi sup.*, p. 145.

of India is only a customary one, and is not authorized by any statute. The title of Viceroy in India indicates that he represents the Sovereign. As Governor-General of India he is subject to instructions from the Secretary of State for India. It must be remembered, at the same time, that a Governor-General of a Dominion, in ordinary cases, does not possess general sovereign power, his authority being derived from his commission.[1] The essential thing to remember is that now a Governor-General in a Dominion does not act for or under the instructions of the British Government, but acts for the King.

An important reason for supplying the Governor-General with information is that as he is not representative of the British Government, it may be of importance for him, as the King's representative, to be informed by his Dominion Government in the same way as is the King by his Home Government of important communications between the two Governments, apart from general public affairs. As to reservation of Bills, Professor Keith (*l.c.*) points out that the decision as to the Governor-General as a channel of correspondence does not apply to matters affecting the reservation of Bills, as regards which he must retain all his present authority and duty. This, however, is at least doubtful. The Dominion constitutions provide for the reservation of certain Bills for *His Majesty's pleasure*, and there seems no reason why the Governor-General should not communicate such Bills to the Crown, leaving it to the Crown, if so advised, to refer them, or any of them, to the Home Government for advice. This is a matter of construction. On the other hand, Mr. Baldwin, the British Prime Minister, stated in the House of Commons on November 25, 1926, that it was not intended to interfere with the Governor-General's duty of representing the Imperial Government in the matter of reserving Bills—which would indicate that the Imperial Government still retains a veto over reserved Bills, or rather, its power of advising the Crown to veto such Bills.

(*c*) *Operation of Dominion Legislation.*—The Committee considered the following matters with regard to Dominion legislation, which required clarification, but, in view of the complexity of the subject, attempted no immediate pronouncement other than laying down certain general principles:—

[1] Halsbury, vol. x, secs. 1032, 1033, p. 594; Tarring, p. 33.

(1) The existing practice under which Dominion Acts are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs (at present the Colonial Secretary), that "His Majesty will not be advised to exercise his powers of disallowance with regard to them."

(2) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure, which is signified on advice tendered by the British Government.

(3) The difference between the legislative competence of the Imperial Parliament and of the Dominion Parliaments, in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.

(4) The operation of legislation passed by the Imperial Parliament in relation to the Dominions, special attention being called to such statutes as the Colonial Laws Validity Act, it being suggested (though not laid down) that in future uniformity of legislation, as between Great Britain and the Dominions, could best be secured by enacting reciprocal statutes based upon consultation and agreement.

The *general principles* laid down were as follows:—

(1) Apart from provisions embodied in constitutions or in specific statutes expressly provided for reservation, it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs.

(2) It is not in accordance with constitutional practice for advice to be tendered to the King, by the British

Government, in any matter appertaining to the affairs of a Dominion, against the views of the Government of that Dominion.

(3) The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of the other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

(4) As to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular as to the desirability of their being enabled to legislate with extra-territorial effect, the constitutional practice is that legislation by the Imperial Parliament will only be passed with the consent of the Dominion concerned.

As there were points arising out of the foregoing considerations, and in the application of the above-mentioned general principles, which required detailed consideration, it was recommended that a committee should be set up, in order to report upon (1) existing statutory provisions requiring reservation of Dominion legislation for the assent of the King, or authorizing its disallowance; (2) (*a*) the existing position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation; (*b*) the practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion; (3) the principles embodied in or underlying the Colonial Laws Validity Act,

1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the British Commonwealth of Nations as described in this Report.

It is clear that, in order to give full effect to the conception of "Dominion status," the necessary machinery must be established by legislation for the purpose; and it was for the purpose of considering the changes to be established, and the requisite legislation, that the special committee recommended in the Report was to be set up.

(*d*) *Merchant Shipping Legislation.*—With regard to this, it was agreed that uniformity of practice was desirable, but that it was difficult to reconcile the application, in their existing form, of certain provisions of the Merchant Shipping Act, 1894, more particularly clauses 735 and 736, with the constitutional status of the several members of the Commonwealth. It was felt to be difficult to introduce any immediate alterations in the existing Merchant Shipping Code (which dealt, *inter alia*, with the registration of British ships all over the world), and that it was necessary, in reviewing the position, to take into account such matters of general concern as qualifications for registry as a British ship, status of British ships in war, work done by British Consuls in the interest of British ships and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad. It was recommended that a special sub-conference should be convened (to meet most appropriately at the same time as the expert committee on laws previously mentioned) for the purpose of considering and reporting on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping of the various parts of the Empire, having regard to the change in constitutional status

and general relations which had occurred since existing laws were enacted. In view of the importance of the shipping interests, India was to have representation at the sub-conference.

Section 735 of the Merchant Shipping Act, 1894, empowers a Colonial Legislature to repeal, wholly or in part, any provisions of the Act relating to ships registered in the colony, other than emigrant ships.

Section 736 empowers a Colonial Legislature to regulate its coasting trade.

(*e*) *Appeals to the Judicial Committee of the Privy Council.*— From the discussions on the conditions governing appeals to the Judicial Committee from judgments in the Dominions, it became clear that it was no part of the policy of the British Government that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was recognized, however, that where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion. In regard to appeals from the Irish Free State, the right was reserved to bring up the facts of this particular case for discussion at the next Imperial Conference.

This merely reiterates the principle that the conditions of Privy Council appeals are the affairs of the particular Dominion concerned, unless the principles at stake affect their Dominions, when they have a right to consultation. The continued existence of appeals to the Judicial Committee, as previously pointed out, does not affect the independent status of the Dominions, any more than the status of any international State is affected by the existence of the Permanent Court of International Justice at The Hague. The final appeal to the Judicial Committee is not a mark of the sovereignty of the Crown, but a matter of convenience in that there should be

a final court of resort for the members of the British Commonwealth. The sovereignty of the Crown, as the dispenser of justice, would still be exercised if the final decision on appeal were given in the particular Dominion in which the case arose.

IV. Relation with Foreign Countries.—The main subject here dealt with was that of treaties with foreign Powers. It was recalled that a beginning had been made towards making clear the relations of the various parts of the Empire with foreign countries by the resolution of the Imperial Conference of 1923, on the subject of the negotiation, signature, and ratification of treaties. It seemed desirable to examine the working of that resolution during the past three years, and to consider the extension of the principles laid down with regard to treaties.

Treaty Procedure.—A special sub-committee was appointed for the purpose, under the chairmanship of Mr. E. Lapointe, Canadian Minister of Justice, which considered the question of treaty procedure.

(*a*) *Negotiation of Treaties.*—It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon the other (Dominion) Governments, and should take steps to inform Governments likely to be interested of its intention. This rule should be understood as applying to any negotiations which any (Dominion) Government intends to conduct, so as to leave it to the other Governments to say whether they are likely to be interested. When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments, and so long as its policy involves no active obligations on the part

of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent.

Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government which has had full opportunity of indicating its attitude, and has made no adverse comments, will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorized to act on its behalf, it will advise the appointment of a plenipotentiary so to act.

The foregoing principles are so plainly stated as to be self-explanatory. It may be added that they apply equally to treaties entered into by Great Britain and the Dominions. While, on the one hand, they admit the competence of the Dominions to enter into treaties as well as and separately from the British Government, the same conditions are to be observed. Generally, the duty is imposed of (1) considering the likely effect on the other Empire Governments likely to be interested, (2) notifying any such Government. A Government so notified must indicate its attitude as soon as possible. If it makes no adverse comment, the Government initiating the treaty may proceed. If, however, the treaty involves active obligations, e.g. of defence, on the part of any other Empire Governments, their definite assent must be obtained. Primarily, this would apply, on historical grounds, and by reason of her rank as a world-Power, to treaties initiated by Great Britain, which might be very likely to involve the Dominions in a common course of action. It is conceivable, however, that it might also apply to a treaty initiated by a Dominion, e.g. where it adopts a repressive immigration policy against the nationals of a particular foreign State, which might choose to regard this as a cause of complaint against the British Commonwealth as a whole.

Form of Treaty.—Some treaties begin with a list of the contracting countries and not with a list of Heads of States

(e.g. the United Kingdom of Great Britain and Northern Ireland, or the United States of America, instead of the King, or the President). In the case of treaties negotiated under the auspices of the League of Nations, adherence to the wording of the Annex to the Covenant, for the purpose of describing the contracting party, has led to the use in the preamble of the term "British Empire," with an enumeration of the Dominions and India if parties to the Convention (i.e. treaty), but without any mention of Great Britain and Northern Ireland and the colonies and protectorates. These are only included by virtue of their being covered by the term "British Empire." This practice, while suggesting that the Dominions are not on a footing of equality with Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.

As a means of overcoming this difficulty, the Report recommends that all treaties, other than agreements between Governments (presumably Empire Governments), whether negotiated under the auspices of the League or not, should be made in the names of Heads of States; and, if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King, as the symbol of the special relationship between the different parts of the Empire. The British units, on behalf of which the treaty is signed, should be grouped together in the following order: Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of the League (of Nations), Canada, Australia, New Zealand, South Africa, Irish Free State, India. The Report contains, as an appendix, a specimen form of treaty.

If a treaty applies to only one part of the Empire, it should be stated to be made by the King on behalf of that part.

The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire renders superfluous the inclusion (in the treaty) of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories (i.e. of the Empire) on behalf of which it has been signed in the King's name. The Legal Committee of the Arms Traffic Conference in 1925 had already made it clear that this principle underlies all international conventions.

In the case of some *international agreements* the Governments of different parts of the Empire may be willing to apply *between themselves* some of the provisions as an *administrative measure*. In this case, they should state the extent to which, and the terms on which, such provisions are to apply. Where international agreements are to be applied between different parts of the Empire, the form (as above recommended) of a treaty between Heads of States should be avoided.

From the status point of view, these are, perhaps, the most important principles laid down. In future, a treaty, where the whole Empire is concerned, is to be signed separately "for Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League (of Nations)," as one separate entity, and then for each of the Dominions as a separate entity.

If only one part of the Empire makes a treaty, it is stated to be made by the King for that part, e.g. a treaty by Australia only is made by the King for Australia.

Full Powers.—The plenipotentiaries for the various British units should have full powers, issued in each case by the King on the advice of the Government concerned, indicating and corresponding to the part of the Empire for which they are to sign. It will frequently be found convenient, particularly where there are some parts of the Empire on which it is not contemplated that active obligations will be imposed, but where the

position of the British subjects belonging to those parts will be affected, for such Government to advise the issue of full powers on their behalf to the plenipotentiary appointed to act on behalf of the Government or Governments mainly concerned. In other cases provision might be made for accession by other parts of the Empire at a later date.

This is the first use, in the Report, of the term "British units." Its use is of importance, as indicating that each part of the Empire separately signing or entering into a treaty stands on the same footing as the rest. Great Britain and those parts not separate members of the League thus form one unit, and each Dominion which is a member of the League (including India) forms another unit by itself. The meaning of this portion is that the plenipotentiaries for each unit are to be furnished with treaty-making powers, issued by the King, on the advice of the Government of that unit, and referring to that unit. Where the interests of British subjects in another unit will be affected by the treaty, though no active obligations are imposed on that other unit, the Government of the treaty-making unit is to advise the issue to the plenipotentiary of such other unit of full powers on behalf of such other unit. In case of a unit where British subjects therein are not affected, the treaty may make provision for the accession of that unit to the treaty at a later date. For instance, Great Britain enters into a treaty which may affect the rights of British subjects in Canada. The British Government is to advise the issue of full powers to the Canadian plenipotentiaries (a term used here in a twofold sense, for "plenipotentiary" ordinarily implies the possession of full powers). South Africa is not directly affected, but the treaty may make provision for the subsequent accession of the Union of South Africa.

Signature.—Where names of countries are appended to the signatures, the different parts of the Empire are to be designated in the same manner as is proposed in regard to the list of plenipotentiaries in the preamble to the treaty. The signatures of the Empire plenipotentiaries are to be grouped in the same manner as is proposed above (under "*Form of Treaty*"). The signature of a treaty on behalf of a part of the Empire should

cover territories for which a mandate has been given to that part of the Empire, unless the contrary is stated at the time of signature.

An example of the rule stated in the last sentence, referring to mandated territories, is South Africa. The signature will, unless the contrary be stated, be in some such form as the following: "for the Union of South Africa and the Mandated Territory of South-West Africa, X.Y."

Coming into Force of Multilateral Treaties.—Generally, treaties contain a ratification clause, and provision that the treaty will come into force on the deposit of a certain number of ratifications. To avoid difficulty on the question whether ratifications on behalf of different parts of the Empire, being separate members of the League, are to be counted as separate ratifications for the purpose of making up the number necessary to bring the treaty into force, it is recommended that, when a treaty is to contain a clause of this character, the clause should take the form of a provision that the treaty shall come into force when it has been ratified on behalf of so many separate members of the League.

The Committee express the opinion that some convenient opportunity should be taken of explaining to the other members of the League the changes which it is desired to make in the form of treaties and the reasons for which they are desired. The various Governments of the Empire should make it an instruction to their representatives at future International Conferences to secure that effect is given to the foregoing recommendations.

Treaties are either bilateral, between two States, or multilateral, between several States.

The recommendation as to a ratification clause means that the clause is to provide for the coming into force of the treaty upon

ratification on behalf of so many separate signatories, provided they belong to the League of Nations, no matter whether they be units of the British Commonwealth or not.

The latter portion of this recommendation, though placed under a heading which may be regarded as comparatively subordinate, is, in reality, one of the most important parts of the Report, for the purpose of giving full international effect to Dominion status. This amounts to the "formal communication to the outside world" of the declaration of constitutional rights of which General Hertzog spoke (above). The "explanation" to the members of the League of Nations, at a "convenient opportunity," is the communication to them of the status of the Dominions, and their accession to treaties in the mode recommended, which is the chief thing that matters in relations between international States, is a sufficiently "formal" mode of giving effect to that status. The communication was actually made to the Council of the League of Nations by Sir Austen Chamberlain, the British Foreign Secretary, on March 9, 1927, the President of the Council, Herr Stresemann, taking note of the declaration in the name of the Council.

(*b*) *Representation at International Conferences.*—The Committee studied the question of the representation of the different parts of the Empire at International Conferences, in the light of the resolution of the Imperial Conference of 1923. Their conclusions were: (1) No difficulty arose as to conferences under the auspices of the League of Nations. (2) As regards conferences summoned by foreign Governments, no universal rule could be laid down. In the case of conferences of a technical nature, it was usual and always desirable that the different parts of the Empire wishing to participate should be represented separately by separate delegations, and where necessary efforts should be made to secure invitations to render such representation possible. Conferences of a political character called by a foreign Government must be considered on the special circumstances of each individual case. It is for each part of the Empire to decide whether its particular interests

are so involved, especially having regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented, or is content to leave the negotiation in the hands of the part or parts of the Empire more directly concerned and await the result. If a Government desires to participate in concluding a treaty, the method of securing representation is a matter for arrangement with the other Governments of the Empire in the light of the invitation received. Where more than one part of the Empire desires representation, three methods are possible: (i) By means of a common plenipotentiary, or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating; (ii) by a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the Conference. This was the form of representation employed at the Washington Disarmament Conference of 1921; (iii) by separate delegations representing each part of the Empire participating in the Conference—and, on this method being desired as a result of consultation, an effort must be made to ensure that the form of invitation from the convening Government will make this method possible.

Certain non-technical treaties should, from their nature, be concluded in a form to render them binding upon all parts of the Empire, and, for this purpose, should be ratified with concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in conclusion of the treaty, for instance, by appointing a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.

Technical treaties, as a rule, are those which relate to scientific or technical matters, as distinguished from politics, such as treaties relating to international weights and measures, industrial property, public health, and the like. A treaty relating to posts or copyright may, on the one hand, be entirely technical, and, on the other, involve political considerations.

(*c*) *General Conduct of Foreign Policy*.—As to the application of the Treaty Resolution of the 1923 Conference, regarding the conduct of foreign affairs generally, it was frankly recognized that in this sphere, as in that of defence, the major share of responsibility rests now, and must for some time continue to rest, with the British Government. Nevertheless, practically all the Dominions are to some extent, sometimes considerable, engaged in conducting foreign relations, particularly those with foreign countries on their borders, for example, the growing work in connection with relations between Canada and the United States, which had led to the appointment of a Canadian Minister Plenipotentiary at Washington. The governing consideration underlying all discussions of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the active assent of their own Governments. In the light of that consideration, the Committee agreed that the general principle expressed in relation to treaty negotiations (see section (*a*), on "*Negotiation*" above), which was, indeed, to a large extent already in force, might usefully be adopted as a guide by the Governments concerned in all negotiations affecting foreign relations falling within their respective spheres.

Briefly, each Government must be the judge of its own participation and representation in foreign affairs—it being recognized that, for the time being, the major responsibility rests with Great Britain —another way of saying that the bulk of foreign business is con-

ducted by the Foreign Office of the British Government. This does not preclude any Dominion from having separate foreign representation, such as Canada has at Washington.

Note should be taken, however, of what is said in section (*e*), below, on "*Channel of Communication*," etc.

(*d*) *Issue of Exequaturs to Foreign Consuls in the Dominions.*— The general practice hitherto, in the case of appointments of all Consuls *de Carrière* in any part of the Empire, has been that the foreign Government concerned notifies the British Government, through the diplomatic channel, of the proposed appointment, and that, provided it is clear that the person concerned is, in fact, a Consul *de Carrière*, steps have been taken, without further formality, for the issue of the King's exequatur. In the case of Consuls other than those *de Carrière*, it had been customary for some time past to consult the Dominion Government concerned before the issue of the exequatur. The British Government, as the Foreign Secretary informed the Committee, accepted the suggestion that in future any application by a foreign Government for the issue of an exequatur to any person who was to act as Consul in a Dominion should be referred to the Dominion Government concerned for consideration, and that, if the Dominion Government agreed to the issue of the exequatur, it would be sent to it for counter-signature by a Dominion Minister. Instructions to this effect had already been given.

In international law, an "exequatur" is a document issued by the State to which a Consul is accredited, confirming his appointment. The appointment is made previously by commission or patent issued by the Consul's own State. The foreign State to which the Consul is accredited is at liberty to decline an exequatur, or to withdraw it when issued.

A Consul is not a diplomatic agent, though it is his duty to protect the rights of his countrymen in the State to which he is

sent. "Diplomatic channel" means the ordinary method of diplomatic intercourse, usually through Ambassadors, Envoys, Ministers, or *chargés d'affaires*.

A Consul *de Carrière* is a professional Consul, i.e. a member of the public service of his country. Other Consuls are mercantile or casual, i.e. such as only rank as honorary Consuls, and are not Consuls by profession, being free to carry on any other occupation or business, and only incidentally discharging consular functions.

(*e*) *Channel of Communication between Dominion Governments and Foreign Governments.*—The Committee took note of a "development of special interest" since the Conference of 1923—the appointment of a Minister Plenipotentiary to represent Irish Free State interests in Washington, to be followed by the appointment of a diplomatic representative of Canada. In cases other than those where Dominion Ministers were accredited to the heads of foreign States, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of general and political concern.

This last sentence is somewhat ambiguous. Presumably it means that unless a Dominion directly accredits a diplomatic representative, communications will pass through the British Foreign Office for the time being.

V. System of Communication and Consultation.—As sessions of the Imperial Conference, at which the Prime Ministers of Great Britain and the Dominions are all able to be present, cannot, from the nature of things, take place very frequently, the system of communication and consultation between Conferences becomes of special importance. Closer personal touch between Great Britain and the Dominions, and the Dominions *inter se*, appeared desirable, development being particularly necessary with regard to matters of major impor-

tance in foreign affairs where expedition is often essential and urgent decision necessary. A special aspect of the question concerned the representation of Great Britain in the Dominions, for the Governor-General, by reason of his constitutional position, as explained in Section III (*b*), is no longer the representative of the British Government, there being, consequently, no one in the Dominion capitals in a position to represent with authority the views of the British Government.

The conclusions of the Committee on this point were summed up in the following resolution, submitted to (and accepted by) the Conference:—

"The Governments represented at the Imperial Conference are impressed with the desirability of developing a system of personal contact, both in London and in the Dominion capitals, to supplement the present system of inter-communication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system is to be worked out is a matter for consideration and settlement between His Majesty's Government in Great Britain and the Dominions, with due regard to the circumstances of each part of the Empire, it being understood that any new arrangements should be supplementary to, and not in replacement of, the system of direct communication from Government to Government, and the special arrangements which have been in force since 1918 for communications between Prime Ministers."

What is contemplated is the appointment of an Agent or Commissioner for Great Britain in the Dominions, to represent the British Government. He is to have nothing to do with the Governor-General, who represents the King in the Dominion. The representation, however, by such an Agent or Commissioner is subordinate to the existing system of direct communication between the

Governments, and that between Prime Minister and Prime Minister. The establishment of the latter, in 1918, is referred to previously in this chapter.

VI. Particular Aspects of Foreign Relations Discussed by Committee.—(*a*) *Compulsory Arbitration in International Disputes.*—It was deemed premature at present to accept any obligations under Article 36 of the Statute of the Permanent Court of International Justice, providing for the compulsory submission of certain classes of cases to the court. A general understanding was reached that none of the Governments represented at the Imperial Conference would take any action in the direction of accepting compulsory arbitration without bringing up the matter for future discussion.

(*b*) *Adherence of the United States of America to the Protocol establishing the Permanent Court of International Justice.*—The Empire Governments were in accord with the conclusions reached by a special Conference at Geneva in September 1926, which discussed the special conditions upon which the United States desired to become a party to the Protocol.

(*c*) *The Policy of Locarno.*—Complete approval was expressed of the negotiations which culminated in the agreements of Locarno, and a resolution to that effect was taken.

The foregoing matters were subjects of interest to the Governments represented at the Conference, as they are members of the League of Nations, but do not directly affect constitutional relations.[1]

[1] The Locarno Pact is fully discussed in *Grotius Society Papers*, vol. xi, 1925, p. 79.

CHAPTER III

INDIA

Though, regarded as a whole, India is a member of the League of Nations, and in that sense, as well as in accordance with the special position which has been accorded to it by the Imperial Conferences, it possesses Dominion status, it is not one homogeneous country or Government. It consists of numerous States and Provinces, great and small, some of which, by conquest, cession, or annexation, belong to the Crown as British territory, while others are protected States with independent or quasi-independent powers in internal affairs, but subject to British suzerainty. There are also certain small parts of the Indian peninsula which belong to foreign Powers, namely, France and Portugal. The French possessions are the ports or settlements of Pondicherry, Karikal, Mahé, and Chandernagore. The Portuguese possessions are Goa, Diaman, and Diu. These, of course, are independent of British rule.

India is thus a geographical expression. In a constitutional sense, the Government of India reaches beyond the boundaries of the Peninsula, for the jurisdiction of the Viceroy and Governor-General extends to Burma on the farther side of the Bay of Bengal, to the Andaman and Nicobar Islands in that bay, the Laccadive Islands off the western coast, and the whole western extension of the mainland known as Baluchistan. Aden in Arabia, and the island of Perim at the mouth of the Red Sea, were formerly under the Government of Bombay, but are now separately administered, having been transferred in 1918 to the political control of the British Foreign Office,

with the intention of placing it ultimately under the Middle East Department of the Colonial Office. The Maldive Islands are tributary to the Government of Ceylon, which is a Crown colony under the Colonial Office, not falling under the general government of India.

Broadly speaking, India, as a whole, is either British territory or under British administration (though not annexed), or consists of Native States subject to suzerainty. The Native States are some 675 in number, and it would serve no purpose to mention them in detail. It is sufficient for our purpose to enumerate the main divisions of territory directly subject to or under the suzerainty of the British Government. These, beginning in the north, and in each case proceeding from west to east, are:—

British Territory.—British Baluchistan, North-West Frontier Province, Punjab, United Provinces of Agra and Oudh, Bihar and Orissa, Bengal, Assam, Burma (Upper Burma, Lower Burma, Arakan, Tenasserim); Sind; Ajmere; Bombay; Central Provinces; Coorg; Madras.

Under British Administration.—Berar.

Native States.—Kashmir, Patiala, Garhwal; Baluchistan; Bahawalpur; Khairpur, Rajputana, Rampur; Sikkim, Cooch Behar; Manipur, Karenni; Cutch, Kathiawar; Baroda; Central India (Gwalior, Indore, Bundelkhand, etc.); Hyderabad, Bastar, Udaipur, Jaipur; Mysore, Travancore, Pudukkottai.

Nepal and Bhutan, on the north-east of the Peninsula, are independent States, the latter receiving an annual subsidy from the Indian Government.

India is frequently spoken of as the British Empire, and this term is official, in the sense that the style "Emperor of India" is part of the Royal title. By the Royal Titles Act, 1876, the Sovereign was enabled to make an addition to the Royal style

and title as Empress (or Emperor) of India. This Act, however, imported no constitutional change, and the existing system of British government continued, until subsequently altered. British India was virtually in the position of a Crown colony, though under the administration of the India Office. At the present time most of British India, as will be seen, is in an intermediate stage between Crown colony government and responsible government, possessing partly representative institutions.

The natives of British India are British subjects.[1] Some doubt, however, exists with regard to the position of the natives of the Native States. Sir Courtenay Ilbert is of opinion that, for international purposes, they are in the same position as British subjects. He doubts, also, whether they would be capable of obtaining a certificate of naturalization as aliens.[2]

This situation arises from the political status of the Native or Feudatory States. In a constitutional sense, they lie entirely outside British India. No general description will fit all of them, though the accepted test is that the inhabitants are not British subjects properly so called, that they (the States) are not amenable to ordinary British jurisdiction, and that they do not pay revenue.[3] Officially, however, the Native States of India are defined as territories of any native prince or chief under the suzerainty of the British Crown, exercised through the Governor-General of India or an officer subordinate to him. The precise status of a Native State, and its relations with the British Government, are determined in part by treaties which have been entered into, or patents (*sanads*) which have been granted, to its chief, and in part by usage, that is, a general body of rules and principles expressing the paramount

[1] Government of India Act, 1858 (21 & 22 Vict., c. 106).
[2] *The Government of India*, p. 392. [3] Halsbury, vol. x, sec. 1017, p. 585.

authority of the Crown, while at the same time limiting the sovereignty of every ruling chief—the final interpretation of these rules and principles resting with the British Government (or *Raj*). The Native States have none of the attributes of external sovereignty, possessing no international character, either as against foreign Powers or as among themselves. Their external affairs, including their dealings with each other, are managed for them by the British Government and under its direction. Being, for international (not internal) purposes, under British jurisdiction, they enjoy precisely the same measure of military and diplomatic protection as do the British Provinces. All of them, in virtue of their territorial rights, in possession of which they have been confirmed by the suzerain or paramount Power, enjoy a measure of internal sovereignty, which varies according to circumstances. Thus, the larger States, such as Hyderabad and Baroda, enjoy considerable sovereign powers. Their chiefs conduct all departments of internal government in their own name, and without interference except in case of maladministration, supreme executive, legislative, and judicial authority being vested in their persons, which are not subject to the jurisdiction of any British court, civil or criminal. A prince like the Nizam of Hyderabad "coins money, taxes his subjects, and inflicts capital punishment without appeal." Certain native rulers, however, have consented to restrict or abandon some of these large powers, out of consideration for the common interests of the Empire. "The minimum of sovereignty is represented by the lord of a few acres in Kathiawar, who enjoys immunity from British taxation, and exercises some shadow of judicial authority." In the smaller and less important States, such as Kathiawar, the judicial power of the chiefs is strictly limited to petty offences, all serious crimes being reserved for the decision of British

political agents, whose jurisdiction is derived from the inherent prerogative of the paramount Power. Sentences of death or imprisonment for life require confirmation from political agents in all States except the very largest. Over European British subjects criminal jurisdiction may only be exercised by a British High Court. In all cases the paramount Power exercises supervision through a resident or political agent, "whose advice," says Mr. J. S. Cotton, "in the last resort has the force of a command." [1]

The Native States are regarded as part of all-India in the international sense, that is, India as a member of the League of Nations, though their representation is through the Government of British India. This is partly in recognition, also, of their share in Empire defence during the Great War. A permanent Chamber of Princes has also been established, which was inaugurated in 1921 by the Duke of Connaught on behalf of the King-Emperor. This is a consultative and deliberative body, having the object of bringing these States into closer association with the Government of India, and to enable them to deliberate on matters affecting their common welfare. Machinery has also been provided for commissions of inquiry, on which the Chamber of Princes will be represented, into cases of misgovernment or misconduct on the part of the ruler of a Native State; and for courts of arbitration to deal with matters in dispute between two Native States or between a Native State and the central or a local Government of British India.[2] At recent Imperial Conferences, also, it has become the rule to provide a seat, amongst the representatives of India, for one of the ruling Princes. Thus the Native States occupy

[1] The foregoing passage is abridged from Ilbert, *ubi sup.*; E. A. Horne, *The Political System of British India*, p. 16; Halsbury, *ubi sup.*, secs. 1017–20; see also *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal*, (1906) A.C. 212.

[2] Horne, pp. 36, 122.

a distinct position of their own, in the political system of India as well as in that of the British Empire.

It is of interest to notice that, under the rule of the East India Company, and for its benefit, there was enunciated what was known as the "doctrine of lapse," by which, on the failure of succession to a ruling house, the territories of the deceased prince or ruler lapsed to the Company, in trust for the Crown. Under this, Nagpur was annexed in 1853. Oudh was annexed in 1856, on the ground, not of lapse, but of misgovernment, though in fact, after the Mutiny of 1857, there were no heirs to succeed. After the pacification following the Mutiny, however, Lord Canning disavowed the "doctrine of lapse," assuring each ruler that "on the failure of natural heirs, the adoption by yourself and future rulers of your State of a successor according to Hindu law and the customs of your race will be recognized and confirmed." Since then no territory has been compulsorily transferred from native to British rule, and the status of a ruling chief is secure.

Before describing the existing system of government in British India, it is desirable to give a brief summary of historical events in relation to changes in administration in the Indian Empire. Various authorities have divided the history into periods. Perhaps one of the most successful attempts at such a division is that of Sir John Seeley, who indicates the stages of development by means of the dates of renewal of the East India Company's charter. Any division, however, must be more or less arbitrary, and it will be sufficient to indicate the leading events marking the progress of British India from its occupation by a trading company to its existing status. Broadly, there are four periods: (1) the early settlement and acquisition of territory by the Company; (2) establishment of government under the Company; (3) assumption of all powers

of government by the Crown, and direct government by the Crown; (4) the period of "reform," with the grant of more liberal and partly representative institutions, intended to lead up ultimately to self-government.

The English East India Company received its charter from Queen Elizabeth on December 31, 1600, whereby it obtained the sole right to trade East, and authority to make peace and war with any Power not Christian "for the honour of our nation and wealth of our people." The first permanent factories were established by the Company at Masulipatam on the east coast in 1611, and at Surat on the west coast in 1612. These were merely trading depots. In 1640 Madras was founded, which was made an independent Presidency in 1653. In 1661 Bombay became the property of Charles II, who transferred it to the Company in 1668, at a rental of £10 a year. Calcutta was made an independent presidency in 1707. For nearly one hundred and fifty years the English had to restrict themselves to trade and wait for the coming downfall of the Mogul sovereignty. Aurangzebe, the last of the great Mogul rulers, died in 1707. During his reign he nearly drove the English out of India, and he would have succeeded but for the sea-power of England. The next contest was between the French and the English. The French East India Company was founded in 1664, and the centre of French power was established at Pondicherry in 1674. The next three-quarters of a century were occupied in the rival efforts of the French and the English to ingratiate themselves with the native rulers and obtain territory from them. Ultimately, in 1752 the French nominee in Southern India was overthrown, with the result that Dupleix, the French Governor-General, left India in disgrace in 1754; and, in the north, Robert Clive won the decisive battle of Plassey in 1757, which made him master of Bengal, of which he

was appointed Governor. The close of the Seven Years' War was the termination of the French power in India, though Pondicherry and Chandernagore were restored to France by the Treaty of Paris, 1763. In 1772 Warren Hastings became Governor of Bengal, and laid the foundations of the present system of British administration and control. The lands of the Company were let out to native rent collectors. They subsequently became the hereditary landlords or zamindars of Bengal. British officials, called collectors, were appointed to superintend the collection of the revenue. Civil and criminal courts were established in each district, with a Court of Appeal at Calcutta. Subsequently this became the Supreme Court. In other parts of India, however, the Company's affairs were disorganized, and the result was that Lord North, in the British Parliament, carried the Regulating Act of 1773. Under this Act, Hastings was made the first Governor-General of *Bengal*, with supervising authority over Bombay and Madras, each of which had a Governor. He was, however, "regulated" in that he had to act with a Council of four at Calcutta, who, by a majority vote, could decide any question in dispute. This Act, which came into force in 1774, may be said to mark the beginning of constitutional government in India.

In 1784 Pitt's India Act was passed. This established a Board of Control in England, consisting of six commissioners, one being the Chancellor of the Exchequer, one a Secretary of State, with four other Privy Councillors. The senior Commissioner, or President of the Board of Control, virtually discharged all its functions, his powers being similar to those of the present Secretary of State for India. The Board of Directors of the Company retained powers of patronage and supervision, but was in fact subordinate to the Board of Control. In India the government was vested in a Governor-General and three

(instead of four) Councillors, with authority over the minor Presidencies of Madras and Bombay. They were prohibited, without the express authority of the Court of Directors, from making peace or war except where hostilities had been commenced, from making treaties, or from guaranteeing the possessions of any country, province, or State. As the price of the concession of the Board of Control, the charter of the Company, which meant a monopoly of the trade, was extended. Lord Cornwallis, who was appointed to succeed Hastings, would not accept the position unless the powers of the Governor-General were altered. This was accordingly done, and a special amending Act was passed, whereby the decision of the majority of the Council is to prevail (the Governor-General having a casting vote), except when the Governor-General is of opinion that the safety, tranquillity, or interests of the British possessions in India, or any part thereof, are, or may be, essentially affected.[1] This provision is still in force. Lord Cornwallis actually assumed office in 1786. In 1793 was made the "Permanent Settlement" of Bengal. In 1813 the Company's monopoly of the foreign trade of India was abolished. The Charter Act, by which this was done, declared "the undoubted sovereignty of the Crown of Great Britain and Ireland in and over the said territorial acquisitions." Twenty years later, in 1833, all the Company's commercial undertakings and trading privileges were abolished. This Act described the members of the Company as "trustees for the Crown of the United Kingdom." In the same year, 1833, a Government of India Act was passed. This completely centralized the financial system, and independent resources were not again enjoyed by the local administrations until

[1] East India Company Act, 1793, secs. 47–9; Government of India Act, 1870, sec. 5.

1870–1. The legislative powers formerly exercised by the Governments of Bombay and Madras were taken away, and were not restored until 1861, although their Executive Councils were retained, being reduced in number from three to two. The Governor-General of Bengal was now designated Governor-General of *India*, his Government becoming known, for the first time, as the Government of India. To his Council a Law Member was added, being "additional," for legislative business only; and he did not become entitled to sit and vote at executive meetings until 1853. The Council exercised both executive and legislative functions. It was not until 1853 that, by the Charter Act, the Legislative Council became distinct from the Governor-General's Legislative Council. In the same year (1853) the old system of nomination to appointments under the Company was abolished, and the system of appointment by competition was introduced. Then came the Mutiny of 1857, and in the following year the government was transferred from the Company to the Crown, by the Act for the Better Government of India, which declared that India should henceforth be governed by and in the name of the Crown. The Company's rule terminated. The office of a new Secretary of State for India was created. He was to exercise all the powers formerly exercised either by the Directors of the Company or by the Board of Control. A Council of India in London was established. This ended the anomalous system of "double government," i.e. by the Company and the Crown. At the same time the additional title of Viceroy was assumed by the Governor-General. It was the term used in the Queen's Proclamation of 1858, though it is not used in any Commission or Act.[1]

[1] The foregoing is a summary of Seeley, *Expansion of England*, 6th ed., pp. 179–272; Flux, pp. 59–61, 99–109; Horne, pp. 49–54; *British Empire*, pp. 571–97; Caldecott, pp. 60–5; Halsbury, *ubi sup.*, p. 589.

In 1853, as we have seen, the Legislative Council was constituted. It was an enlargement, for legislative purposes only, of the Governor-General's Executive Council, consisting of the Governor-General, the ordinary members of the Executive Council, and six other members. No native of India had a seat. The Indian Councils Act of 1861 doubled the legislative members of this Council, of whom half were to be non-officials, who might be Indians. Legislative Councils of a similar type were also created for Madras and Bombay. A Legislative Council was also established for Bengal. Later on, in 1886, a Legislative Council was created for the North-Western Provinces, and one for the Punjab in 1897. These Councils only had law-making powers, and their members were not permitted to indulge in general debates, or to ask questions. In 1882 a system of local self-government on popular lines was established, of which it is said that "the actual results of the experiment have been admittedly disappointing."

The Indian Councils Act of 1892 reconstituted the Governor-General's Legislative Council, the number of members being increased, two non-official members being "recommended for nomination" respectively by the non-official members of each of the four provincial Legislative Councils and by the Calcutta Chamber of Commerce—a step towards an elective system. In 1909 came what are known as the "Morley reforms," introduced by Lord Morley of Blackburn, the Secretary of State. Under the Indian Councils Act of that year the Indian or Governor-General's Legislative Council was to consist of the Governor-General and thirty-six official members, and thirty-two non-official members, of whom five were nominated and twenty-seven elected. The system of election was partly direct, partly indirect, the electo-

rates consisting of the non-official members of the provincial Councils, the large landholders in six provinces, Mohammedans of approved standing in six provinces, and three European Chambers of Commerce. The same general plan of nomination and election was applied to the provincial Legislative Councils. In 1912 two additional Legislative Councils were created—for Assam and the Central Provinces respectively. The Act of 1909 also enlarged the Governor's Executive Council in Madras and Bombay to a maximum of four members each, one native member being appointed, and power was given to create an Executive Council for Bengal, and, with the approval of both Houses of the British Parliament, for any other province. In 1915 was passed the Government of India Act, which consolidated the existing constitutional laws in India, and repealed the Act of 1861. After this followed a considerable period of agitation, during which there were various proposals for alterations in the existing system. In 1917 came the declaration of Mr. Montagu, the Secretary of State, foreshadowing ultimate self-government. In June 1918 appeared what was known as the Montagu-Chelmsford Joint Report, drawn up by the Secretary of State and the Viceroy jointly, which formed the basis of the constitutional alterations made in 1919. It was at this time that the proposal for "dyarchy" was propounded, to which later reference is made. It was suggested that some form of responsible government was to be introduced in the great provinces, suitable areas of workable size being defined for the purpose, with new State Governments, whose executive was to consist of Ministers chosen from the majority party in the State assembly (which was to be popularly elected), and responsible to it. Certain functions were to be transferred to the new State Governments, while the existing provincial Governments were to continue to administer certain "reserved"

departments. The provincial Legislative Council was to be an advisory body only. This system of dyarchy contemplated a division of areas as well as of functions, and was not accepted by the authors of the Joint Report. The principle of dyarchy which the Joint Report adopted was that of division of functions, which is explained below.

The Act of 1919, which, read with that of 1915, embodies the principles relating to the government of India at the present time, is entitled the Government of India (Reforms) Act. It is an Act of the British Parliament, and, before being passed, was considered by a Joint Select Committee of the Lords and the Commons. In form, it is an amending Act, and is "not a complete or self-contained instrument of government." [1] The principal Act is still that of 1915, which is to be known, simply, as the Government of India Act. The Act of 1919 merely outlines the framework of constitutional government, and the details involved in building up the new system of government are determined by rules supplementary to the Act, and published under powers conferred by it. These rules, in either their draft or their final form, must be laid before the British Parliament for its approval. The Act received the Royal assent on December 23, 1919. In January 1921 the provincial executives under the reformed system assumed office. In January and February 1921 inaugural meetings of the reformed provincial Legislative Councils took place. The all-India legislature was opened by the Duke of Connaught on February 9, 1921.

It is now necessary to give a brief summary of the existing system under which British India is governed, dealing, in the first place, with the administration in England, or what is known as the "Home Government"; then, with all-India; and, finally, with the provinces.

[1] Horne, p. 86.

Home Government

Theoretically, the British Parliament has the supreme control of Indian affairs; but it does not interfere in them directly. It acts only, as it has done in the past, by creating a constitution, which regulates the government both in England and in India. That constitution Parliament alone has power to amend. Nevertheless, it has supreme power to legislate generally for India, reserved to it by the Government of India Act, 1833, but that power is rarely exercised, and may be said to be almost as non-existent as the power to legislate for a Dominion. The salary of the Secretary of State, formerly paid out of Indian revenues, is now (under the Act of 1919) voted by the British Parliament, and the acts of the Secretary of State are consequently open to discussion in debating the Estimates, apart from the general right of the legislature to inquire into Indian affairs. The Secretary of State is, like any other Minister, responsible to the criticism of censure of Parliament, this responsibility being shared with the Cabinet.

The direction of the conduct of all business in England relating to the government of India is in the hands of the Secretary of State for India, by whom all official communications and documents must be signed, all appointments by the Crown being made on his recommendation, while he has the power of dismissal. He has inherited the powers of the Board of Control and the Court of Directors, and accordingly has authority to superintend and control all acts or matters relating to government and revenue. In certain specified matters, the concurrence of a majority of members of the Council of India who are present is required; while in other matters the determination of the Secretary of State is final, but dissentient members may have their opinion and reasons recorded. This

Council consists of not more than twelve, nor fewer than eight members, whose normal term of office is five years. Since 1907 two, and recently three, natives of India have been members. Appointments to membership are made by the Secretary of State. A member may be removed from office on an address of both Houses of Parliament. A member may not sit in Parliament.

The Council of India is an advisory body, though, as above stated, a majority must concur in certain decisions. Its general functions are to conduct Indian business in the United Kingdom and to supervise correspondence with India. By statute, it must meet once a month, though the usual practice is to meet weekly. The Secretary of State presides at meetings of the Council and has a casting vote. If he rejects the advice of the Council in matters wherein he is empowered to act alone, he must record his reasons for doing so. Under the Act of 1919 the work of the Council may be divided into departments, in order to expedite it. In practice, the departmental work is done by committees.

Under parliamentary rules there exists a Standing Committee on Indian affairs, in succession to the former Joint Select Committee. It consists of eleven members of each House, representing all political views. To this Committee are referred Acts passed by the Governor-General or a Governor over the heads of the central or provincial legislature, and all amendments in the Rules framed under the Government of India Act. In regard to these the Standing Committee may recommend approval or disallowance by Parliament, but it has, of course, no statutory powers.[1]

[1] Horne, pp. 62–4, 122–4; Halsbury, *ubi sup.*, vol. x, secs. 1025–9, pp. 590–3.

The Central Government in India

The Executive Government of India is a creation of statute, which vests the superintendence, direction, and control of the entire government, both civil and military, in the Governor-General in Council, subject to any instructions received from the Secretary of State. The Governor-General is thus inseparable from his Executive Council, forming part of it, and bound by the decision of the majority, save in very special circumstances, when, as we have seen, he may overrule it. The Central Government is thus that of the Governor-General in Council, not the Governor-General *and* Council. As Viceroy, the Governor-General possesses no special powers, although the name lends added dignity to his office. There are eight members of the Council, inclusive of the Viceroy and the Commander-in-Chief, three being Indian members. There is one Law Member. The Governor-General and one other member form a quorum, special rules being invoked in the event of the absence of the Governor-General. His customary term of appointment is five years, and he may not leave India during his term of office. A special Act had to be passed to enable Lord Reading to proceed to England and consult the Secretary of State during his term of office (1924).[1]

There are various departments of State, each under a member of Council, one of which, the Foreign Department, has charge of all business between the Government and Native States.

The whole military government is vested by statute in the Governor-General in Council, the chief executive officer being the Commander-in-Chief, who is a high military officer, appointed by warrant under the Royal Sign Manual on the advice of the Secretary of State for War, while at the same time

[1] Mill, *Rep. Govt.*, c. xiv; Halsbury, *loc. cit.*, secs. 1034–5; Horne, p. 51.

he is appointed by the Secretary for India to be an extraordinary member of the Governor-General's Council, with rank next after the Governor-General. The direction and control of the whole military government vests by statute in the Council.[1]

The supreme legislature for all India, apart from the reserved power of the British Parliament, consists, under the Government of India (Reforms) Act, 1919, of the Governor-General and two Chambers, the Council of State and the Legislative Assembly. The Governor-General neither sits in nor presides over the legislature, though he has the right of addressing that body, and may summon it specially for the purpose. His assent is necessary to laws. The Council of State is a sort of senate or body of "elder statesmen." Its maximum number of members is 60, of whom not more than one-third are to be officials. As constituted in 1921, there were 34 elected members, 20 official members, and 6 other nominated members. The Legislative Assembly consists of a minimum of 140 members, of whom at least five-sevenths must be elected, while not more than two-thirds of the nominated members may be officials. In 1921 it contained 104 elected members, 26 official members, and 14 other nominated members. All members of the Governor-General's Executive Council must be nominated as members of either the Assembly or of the Council of State. The President of the Assembly is nominated by the Governor-General, though there is power, and it is intended, that the two bodies shall in the future elect their own presidents. Members of the Executive Council may attend and address both Chambers, though sitting only in one.

The normal life of the Assembly is three years; that of the Council of State five years. The Governor-General may, however, dissolve either Chamber, but must summon a new

[1] Acts of 1915 and 1918.

Chamber within six, or at the latest nine, months. Under special circumstances, he may extend the life of the legislature. The subjects of legislation by the all-India legislature are defined by statute. The assent of the Crown to laws is implied in that given by the Governor-General. The Crown may disallow any Act, its pleasure in regard to legislation being signified through His Majesty in his Privy Council. The Governor-General may reserve legislation for the approval or otherwise of the Secretary of State. As in the constitution of the Union of South Africa, if the two Chambers of the Indian legislature fail to agree upon any piece of legislation, recourse (in India at the discretion of the Governor-General) may be had to a joint session of the two Chambers, at which a majority vote of members present shall prevail.

The all-India legislature does not enjoy complete financial control, certain matters of finance being reserved for certification by the Governor-General, though the normal annual appropriations of all departments are subject to the vote of the legislature. New taxation must be concurred in by both Chambers; but annual appropriations are submitted, in the form of "demands for grants," to the vote of the Assembly alone. The Indian customs tariff is a matter for the central legislature alone, and the provincial legislatures have no voice in it.[1]

The Provincial Governments in India

It is in the field of provincial government that the most interesting and important changes were introduced by the Act of 1919, having in view the habituation of the people in the provinces to partial forms of popular government, which might pave the way for ultimate responsible government. At

[1] Act of 1919, and Rules thereunder, *passim*; Horne, pp. 53–7, 91, 106.

the same time, to guard against violent change, certain powers were reserved to the Government in its older form, so as to afford a check upon hasty legislation and the sudden transference of complete powers to people as yet unused to the methods of popular government. This is the system of "dyarchy," or dual government. Under this, certain matters are transferred to the administrative control of the provincial executive and legislature, while others, known as reserved subjects, which formerly fell within the purview of the Central Government, are now administered by the Executive Council of the province. These subjects, reserved and transferred, are provincial, as distinguished from the subjects of central administration. Certain subjects are completely provincial, however, only in respect of administration, and may only be legislated upon by the central legislature, the object being to secure uniform legislation throughout India.

The head of a province is the Governor, appointed by the Crown, as are the members of his Executive Council. In the case of the Presidencies—Madras, Bombay, and Bengal—the Governor is usually an Englishman from England. In the case of the other provinces, the rule indicated is to select a person who has risen to high rank in the Indian Civil Service, whether a native or a European—after consultation with the Governor-General. The Governor is subordinate to the Governor-General in Council.

In order to carry out the system of dyarchy, the Governor has both his Executive Council and Ministers representative of the legislature. The Executive Council consists of one official and one non-official member, though in certain provinces there are two of each class—four being the maximum. Here, again, the Governor acts *in* Council, having the statutory power of overruling the other members in special cases. The

Ministers administer the transferred departments, and are two or three in number, being drawn from the elected members of the legislature. The distribution of departments among executive members and Ministers varies in different provinces. The Ministers are appointed by the Governor, and hold office during his pleasure. No Minister may hold office for more than six months, unless he has been or becomes elected to the legislature. The Governor is guided by the advice of the Ministers in relation to transferred subjects, unless he sees cause to dissent, in which case he may act otherwise.

As to civil servants under the dual Government, the Rules provide that authority over officers serving in transferred departments is to be exercised by Ministers, and over other officers by the Governor in Council. Where an officer performs duties both in reserved and transferred departments, he is to be deemed as serving under the Governor in Council, or under a Minister, as the Governor may decide. There are other provisions safeguarding the position of public officers, their pay, transfer, or dismissal, the ordinary principle being that the Governor must concur in any such act except dismissal, which must be made by the authority appointing any such officer.

The Legislative Councils are also constituted by the Act of 1919, there being a statutory minimum number of members, of whom not less than 70 per cent. shall be elected, and not more than 20 per cent., including the members of the Governor's Executive Council *ex officio*, shall be nominated.[1]

[1] Under Rule II of the Electoral Rules for the Provinces the local legislatures are constituted as follows: *Madras*, 98 elected, 19 official, 10 nominated; *Bombay*, 86 elected, 16 official, 9 nominated; *Bengal*, 113 elected, 16 official, 8 nominated; *United Provinces*, 100 elected, 16 official, 7 nominated; *Punjab*, 71 elected, 14 official, 8 nominated; *Bihar and Orissa*, 76 elected, 18 official, 9 nominated; *Central Provinces and Berar*, 53 elected, 8 official, 9 nominated; *Assam*, 39 elected, 7 official, 7 nominated. The "official" number does not include the two *ex-officio* members.

The Governor has power to nominate, in addition to the ordinary members of the Legislative Council, not more than two experts (or one in the case of Assam), for the purposes of any specially important matter of legislation, who, for the time being and in relation to such special matter, enjoy all the rights of members of the Council. They need not be officials.

The transferred subjects are those regarding which the Legislative Council has power to legislate. The Rules, on the other hand, enumerate a list of statutes applying to all-India, which, in discharge of its normal legislative powers, the Legislative Council has no power to modify. With regard to provincial subjects which, for the reason stated above, are legislated upon normally by the central legislature, a provincial legislature has no jurisdiction. There are certain other provincial matters which the Governor-General may declare subject to legislation by the central legislature, to the extent necessary to secure uniformity; and in these subjects the provincial legislature may pass laws only with the previous assent of the Governor-General. On the other hand, with such sanction legislation of practically any kind, excepting such as affects the authority of Parliament or unwritten laws of the British constitution affecting allegiance of the subject or the sovereignty of the Crown, may be undertaken either by the Indian or the local legislature, and to this extent their jurisdiction is concurrent over the whole field of legislation. This, however, is only so in theory, i.e. where the previous sanction of the Governor-General has been given. In actual practice, however, the respective legislatures, central and local, are confined to the legislative powers which are classified under the Devolution Rules as central and provincial. The result, however, of the theoretical capacity of the provincial legislature to deal with any subject except those which are specifically "central" is

that a statute cannot be challenged in the courts on the ground that it is *ultra vires*, or in excess of the powers of the legislature by which it was passed.

With regard to financial matters affecting provincial subjects, a provincial legislature has full powers; and it may deal with such matters without the previous consent of the Governor-General. Each province, on the other hand, is liable for capital charges on irrigation works, annual charges on the famine insurance fund, and the balance of the outstanding provincial loan account (which must be paid off in twelve annual instalments). A province, also, has power to negotiate loans, either in India or abroad, on the security of the provincial revenues. The provincial legislature may, further, authorize or impose additional taxation for the purposes of local authorities (such as municipalities or district boards), or for provincial purposes. For any such tax the previous sanction above mentioned is not necessary, provided the tax is one contained in a schedule of taxes prepared for the purpose. The division between central and provincial subjects of revenue follows that between the respective subjects of legislation, with the proviso, on the one hand, that 25 per cent. of the increase in the provincial collections of income tax (which is a "central" subject) so far as that is due to a growth in the amount of income assessed, is hypothecated to, that is, ear-marked for, the province; while, on the other hand, contributions are payable to the central exchequer out of provincial revenues, the amount payable in the first instance being fixed at £10,000,000 in all.

The allocation of funds (i.e. revenue and expenditure) between reserved and transferred departments is a matter of agreement between the two divisions of the administration, failing which it is settled by the Governor at his own discretion

or on the advice of an arbitrator appointed by the Governor-General. Expenditure on transferred subjects from the funds assigned thereto, or from the proceeds of taxation specially imposed for the purpose, is to be as determined by the vote of the Legislative Council. But no posts to which appointments are ordinarily made by the Secretary of State, and no post carrying similar emoluments, may be created or abolished, nor may the pay attaching thereto be revised, without previous sanction of the Secretary of State in Council.

The Ministers, though not actually responsible to the Legislative Council, are in effect responsible to it in regard to transferred subjects of legislation, for if the executive has not the approval of that body in regard to them the Government cannot be carried on. Under the Instrument of Instructions issued to the Governors of provinces, the Governor, in considering a Minister's advice and deciding whether or not there is sufficient cause in any case to dissent from his opinion, is to have due regard to his (i.e. the Minister's) relations with the local legislature, and to the wishes of the people of the province, as expressed by their representatives in that body. It must be remembered that a Minister sits in, and must become a member of, the Legislative Council.

With regard to the administration of reserved subjects, there is, in pursuance of the principle of dyarchy, no responsibility to the local legislature. For this the Governor is responsible, ultimately, to the Imperial Parliament alone, notwithstanding any intermediate devolution of powers by the Secretary of State and the Governor-General in Council. The Governor, it must be remembered, though he must carry out lawful instructions of, or duties delegated to him by, the Governor-General in Council, is appointed by the Crown.

The Legislative Council cannot thus interfere with the

discharge of his functions by the Governor in regard to reserved subjects. In order to secure to the Governor freedom of action in this regard, there has been introduced what is known as the "certificate procedure," which, of course, is an extraordinary remedy, the presumption being that, as a rule, and in the usual course, the legislature will pass Bills introduced by the Governor.

Under the Act of 1919, if the Governor's Legislative Council refuses leave to introduce any Bill relating to a reserved subject, or fails to pass it in a form recommended by the Governor, he may certify that its passage is essential for the discharge of his responsibility for the subject, and thereupon the Bill, although the Council has not consented thereto, shall be deemed to have passed and, on signature by the Governor, shall become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the Council, or in the form recommended to the Council by the Governor.[1] An Act so passed must, save in case of emergency, be reserved by the Governor-General for the opinion of the King in Council, and must in every case be laid before Parliament—so that, if upheld, it has the full concurrence of the authorities in England. Apart from this, the Governor-General in Executive Council may, in cases of emergency, promulgate Ordinances, which, for not more than six months from promulgation, have the like force of law as an Act passed by the legislature.[2]

Apart from his power to withhold assent to any Bill after it has been passed by the Legislative Council, the Governor may certify that the whole or any clause of any Bill introduced or proposed to be introduced, or any amendment to a Bill,

[1] Government of India (Reforms) Act, sec. 13 (1).
[2] Act of 1915, sec. 72.

affects the safety or tranquillity of his province or any part thereof, or of another province, and may direct that no proceedings or further proceedings shall be taken in relation to the Bill, clause, or amendment, and effect shall be given to any such direction.[1]

The "certificate procedure" also extends to demands for money grants relating to reserved subjects, where the Legislative Council has refused or reduced such grants; and the Governor has power in cases of emergency to authorize expenditure necessary for the safety or tranquillity of the province, or for carrying on any department.[2]

The Governor-General, in relation to the all-India legislature, possesses the same powers under the "certificate procedure," though he must, in the first instance, endeavour to obtain the assent of one of the two Chambers.

The Governor no longer presides in the provincial legislature, the President being nominated during the first four years, it being contemplated that after that he shall be elected.

With regard to provincial legislation, the assent thereto is required not only of the Governor, but also of the Governor-General. Either can veto a Bill, and his veto is absolute. The Crown may disallow any Act. The Governor may also reserve certain legislation for the opinion of the Governor-General, and he must reserve it in the following cases: (1) Bills seriously modifying the land revenue system; (2) Bills affecting the religion of any class; (3) Bills concerned with the constitution of a university or a light railway. The pleasure of the Crown in England with regard to Acts is signified in the same way as with regard to legislation by the central legislature. The Governor-General may also reserve any provincial measure for the signification of His Majesty's pleasure, other than Bills

[1] Act of 1919, sec. 11 (4). [2] *Ibid.*, sec. 11 (2).

reserved for the Governor-General's own consideration. The Governor-General may assent to a reserved Bill, and failing such assent being given it lapses. Alternatively, he may allow the Governor to return it for the further consideration of the Legislative Council. He also has this power of recommitting a measure which has been passed by both Chambers of the all-India legislature.

In regard to reserved provincial subjects, the Governor has power to certify expenditure upon them independently of the vote of the Legislative Council. The normal rule is that annual appropriations of all departments are subject to its vote; but appropriations for certain specified purposes do not require to be voted. All proposals for appropriation must be made on the recommendation of the executive.[1]

Generally, it may be said that the tendency, which is in effect authorized by the Reforms Act of 1919, is towards greater legislative freedom in the Legislative Council of the provinces, with the ultimate goal of responsible government in view. There is nothing to prevent the addition of any or all of the remaining reserved subjects to the list of transferred subjects of legislation. The Ministers are not collectively responsible to the Council, as a Cabinet would be; but each of them, as above stated, is responsible to it and subject to its control. Ultimately, the abdication of powers by the Imperial Parliament must result in their transference to a local and fully responsible Government, for, as Mr. Horne states, "dyarchy is essentially a temporary device, and is intended to remain in force only until such time as the Home Rule (i.e. provincial) Government has got firmly into the saddle." [2]

[1] Act of 1919, secs. 11 (2), 25 (2).

[2] Acts of 1915 and 1919, *passim*; Horne, pp. 54–7, 101, 105–7.

CHAPTER IV

THE CROWN COLONIES

In the strictest sense, a Crown colony is one in which the powers of government, legislative and administrative, are exercised by the Crown, acting through the officer administering the government, who is usually designated "Governor." In the case of certain colonies, judicial powers were at one time exercised by the Governor also, and remnants of this system are still left in the case of certain small dependencies, where the Governor sits in appeal from the decisions of inferior courts, and in certain protectorates, where the Crown administrator, usually designated "Resident Commissioner," may himself sit in the superior Court of first instance, though appeals lie, as a rule, to the Judicial Committee of the Privy Council. The ordinary system of administration of justice, however, is by judges nominated by the Colonial Office in London and holding their appointments from the Crown, appeals lying, in each case, to the Judicial Committee. Where a Crown colony has a legislature, judicial appointments are, as a rule, made locally.

The term "Crown colony" has, however, come to be applied in a wider sense to all those colonies and dependencies (apart from protectorates and mandated territories) which are not fully self-governing, that is, which have not responsible government, or what is known as "Dominion home rule." The test of whether a dependency is a Crown colony is not whether it possesses "Dominion status," for, as we have seen,

India possesses that, though not fully self-governing, but whether it enjoys responsible government.

From time to time various modifications have been introduced in the simple and original principle of direct rule by the Governor, so that now the conception of a Crown colony varies from that direct mode of government to one in which the legislative powers, at any rate, are largely shared with, if not wholly exercised by, legislatures partly nominated and partly or even entirely elected by the citizens, that is, the qualified voters, of the colony. Even where there are elected legislatures, however, the whole of the administrative powers are retained and exercised by the Governor, and either he or the Colonial Office appoints the subordinate officers of government. In executive matters the Governor is ordinarily assisted by an Executive Council, who either have the right to vote upon such matters or are restricted to purely advisory functions without a vote.

It will thus be seen that the Crown colony system varies from a government in which a Governor or officer of like rank and powers both legislates and administers, to one in which the Governor discharges no legislative functions, his powers in respect of legislation being limited to assenting to or vetoing Bills, or reserving them for the signification of the Royal pleasure. Where there is an elected legislature, representative government is said to exist. In the case of responsible government, as we have seen, such as exists in the Dominions, the Cabinet system has been superadded to the representative system. In a representative system, though the members of the legislature are each of them individually responsible for their personal acts to the electors who have elected them (whose only remedy is not to re-elect them), they have no responsibility, joint or several, for the acts of the Executive

Government or of the legislature as a whole. Responsibility rests with the Governor or officer administering the government, who is accountable for his acts to the Colonial Office, which, in turn, through the Secretary of State, is responsible to the Imperial, that is, the British, Parliament.

The Crown colonies are officially classified according to the extent to which they fall under, or depart from, direct legislation by the Crown, acting through or apart from the Governor. It has been the established practice, for nearly two centuries, to grant modified legislative institutions to the colonies, according to the degree of advancement and fitness for such institutions which they have attained. The grant of such institutions, and even the ultimate grant of responsible government, does not depend upon either extent of territory or size of population, but entirely upon their fitness for more advanced institutions, a matter which is wholly in the discretion of the Crown, acting upon the advice of the British Government. Such grants, as a rule, form the subject of legislation by Order in Council, although there have been instances, apart from the constitutions of the self-governing Dominions, where a more extended constitution has been conferred by Act of the Imperial Parliament, as in the case of the Quebec Act, 1774, and the Act dividing the two Canadas, 1791.

A classification of the kind mentioned must, accordingly, vary from time to time, as fresh modifications take place, and can, at best, be only temporary. The existing classification is as follows:—

Colonies with no Legislative Council.—Gibraltar, St. Helena, Wei-hai-wei.

Colonies with wholly nominated Elective Councils.—(1) Official majority, i.e. majority of Government officials: Falkland Islands, Gambia (with protectorate of same name, under same

Governor and Legislative Council), Gold Coast, Hong-Kong, Northern Rhodesia, Seychelles; (2) unofficial majority, i.e. of nominated citizens not being Government officials: British Honduras.

Colonies with partly elected Legislative Council with minority of elected members.—Fiji, Grenada, Jamaica, Kenya, Leeward Islands Federation, Mauritius, Nigeria (to be distinguished from the protectorate of the same name, which, however, is administered by the same Governor, Executive Council, and Legislative Council), St. Lucia, St. Vincent, Sierra Leone (with protectorate of the same name, administered by the same Governor and Legislative Council), Straits Settlements, Trinidad.

Colonies with partly elected Legislative Council with majority of elected members.—British Guiana, Ceylon, Cyprus.

Colonies with wholly elected House of Assembly and nominated Legislative Council.—Bahamas, Barbados, Bermuda.[1]

There are no longer any Crown colonies where there are two Houses of the legislature in which the Upper House, or Legislative Council, is elective. Formerly there were cases of this kind, such as that of the Cape of Good Hope, which, before 1872 (when responsible government was introduced) already possessed an elective Legislative Council.

Where there is no Legislative Council, the Governor usually legislates by Ordinance or Proclamation. The Crown has, however, reserved the right to legislate by Order in Council in the case of Gibraltar, St. Helena, Ceylon, the Falkland Islands, Fiji, the Gambia, the Gold Coast, Hong-Kong, Malta, Mauritius, Seychelles, Sierra Leone, Southern Nigeria, the

[1] Lists of colonies according to their legislatures will be found in the Colonial Office list; Tarring, *ubi sup.*, p. 60; Zimmern, *ubi sup.*, p. 18; Chalmers and Asquith, p. 172; Halsbury, *ubi sup.*, and supplement (1926); *Whitaker's Almanac*, etc.

Straits Settlements, Trinidad and Tobago, Grenada, St. Lucia, St. Vincent, and British Guiana. In the case of these colonies laws may thus be made either by the Governor or by Order in Council.

The legislatures of the various provinces of British India are also partly (and mainly) elective, and partly nominated (see Chapter III). These provinces, however, are not colonies, and are not under the Colonial Office, but, like the rest of India, under the India Office.

The grant of fully representative institutions to a Crown colony, as we have seen, is in the discretion of the Crown, and may be made by Order in Council, although there have been cases where it has been embodied in an Act of the Imperial Parliament. Responsible government has, in certain cases (e.g. the Cape of Good Hope) been assumed by an Act of the colonial legislature itself, although the usual practice has been to create it by an Act of the Imperial Parliament. When a colony receives responsible government, the existing departments of the administration, and even the legislature itself, need undergo no essential change. All that need be done, and all that has usually been done, is to enact that there shall be Ministers who must be members of the elective legislature, and to provide that the Ministers shall be charged with the administration of the various departments of State or Government. From this the responsibility of the Ministers to the legislature follows automatically, for the Ministers cannot continue, at any rate for any long period, to discharge their functions unless they possess the confidence of a majority of the legislature. They certainly cannot for very long act in opposition to the will of the legislature.

The position of those colonies which formerly enjoyed responsible government and have since become constituent

States or provinces in those larger aggregates which are now the self-governing Dominions is an intermediate one. They are neither Crown colonies nor do they possess full responsible government. The constituent provinces or States of Canada and Australia respectively have their Cabinets or Ministries, which are responsible to the local legislature, and are dependent upon its support for their continuance in office. But their powers are either completely circumscribed, while the Central Government has all other powers, as in Canada, or a certain portion of their powers has been taken away from them and entrusted to the Central Government, while at the same time the residue of undefined powers remains with the constituent States, as in Australia. In either case, the constituent provinces or States no longer dispose of the whole field of legislation competent to a self-governing Colony over which they formerly had jurisdiction, and in many respects they are subordinate to the Central Government. In the Union of South Africa the Provincial Councils, though they are genuine legislative bodies in respect of the matters with which they are competent to deal, are nevertheless wholly subordinate to the Central Parliament, which may alter or abrogate any of their powers, and may override their statutes.[1] Such provinces or States cannot attain to full autonomy without a breaking-up or disruption of the larger aggregates of which they form part —an eventuality which would be wholly at variance with and in contradiction to the full self-governing powers which such larger aggregates have attained.

Nevertheless, there is a distinct tendency observable on the part of such constituent provinces or States to obtain larger powers than are defined for them by the Dominion constitu-

[1] *Middelburg Municipality* v. *Gertzen*, (1914) A.D. 550; *Rex* v. *Swartz*, (1914) T.P.D. 630; *Williams and Adendorff* v. *Johannesburg Municipality*, (1915) T.P.D. 106.

tions to which they have given their assent. Thus it has recently been announced that Manitoba intends to press a claim against the Dominion of Canada for the vesting in that province of the right to lands which are now vested in the Dominion of Canada, and in respect of which the Dominion Government pays a yearly amount of £700,000 to the province of Manitoba. An analogous case, though arising between a province of a Dominion and a self-governing colony wholly independent of the Dominion, is that in which Newfoundland has recently asserted a successful claim to the coast lands of Labrador before the Judicial Committee, which decided that the claim of Newfoundland to those lands was superior to that of the province of Quebec (1927). It was admitted by the Quebec Government that part of the Labrador coast belonged to Newfoundland, but the frontier line between it and the Canadian hinterland had been in dispute for many years. The importance of the decision of the Judicial Committee, apart from the immediate value of the territory in question, lay in the fact that it was, in effect, an award made upon a voluntary submission to it of a dispute between two parts of the Empire, thus enhancing the position of the Judicial Committee as a final arbiter.

CHAPTER V

THE PROTECTORATES

The term "protectorate" has never been the subject of statutory definition by the British Parliament. Nevertheless, the relationship between a protected State or territory and its protector has been known from ancient times. With the Romans, when a State had been conquered or had entered into a treaty by which it was to receive the protection of the Roman power, and it was desired to leave such State a semblance of independence and not formally to annex it, the dominant power, i.e. Rome, became the *patronus* or protector, and the subject city or territory became the *cliens*, or dependent. In mediæval times the relationship was expressed in terms of feudal law. One State was the vassal of, and did homage to, the other. The protected State retained its sovereignty.[1]

The existence of protectorates is fully recognized in International Law, which, however, owing to the varying nature of the relationship, does not lay down any general definition. Some of them have originated in treaties, while others have been imposed by force, or by "peaceful occupation," which, in effect, is force without its display. A distinction is usually made between a treaty of guarantee, which guarantees the existence and independence of the weaker State, and a protectorate, which implies a closer relation. In the case of many protectorates, mainly over uncivilized peoples or unorganized

[1] The definitions and the general position are summed up in the late Sir John MacDonell's article "Protectorate" in *Encyclopædia Britannica* (11th ed.), See also Baty, *Int. Law*; Hall, *Foreign Jurisdiction of the British Crown*; Jenkyns. *British Rule and Jurisdiction Beyond the Seas*; Halsbury, *ubi sup.*, vol. x, secs. 856, 885, pp. 503, 521.

territories (i.e. territories not organized and erected into a regular Government), there usually is occupation by the protecting Power, which is really indistinguishable from annexation. In the strict legal sense, however, there is not annexation, because the territory of the protected country does not become subject to the absolute ownership or dominion of the protecting Power. In recent times, however, as will be seen, it has been the policy of the British Government, in the exercise of a protectorate over an uncivilized or unorganized people, to make dispositions regarding their territory which, in effect, amount to annexation. Here, the declaration, assertion, or constitution of a protectorate has usually been the preparatory step to annexation, and the foundation of a Crown colony. In theory, however, the Crown, where it holds in its own name territory in a protectorate, holds such land merely as overlord, and as a trust to be administered for the benefit of the protectorate, not as an appanage of the Crown itself.

Thus, in strict law, the territory in a protectorate does not belong to the British Dominions. Nor are the subjects of the protectorate British subjects. But the protectorate has no foreign or international relations except through the medium of the protecting Power. At the present time, "the distinct tendency, especially as to protectorates over uncivilized countries, is to treat, for purposes of International Law, the territory of a protectorate as if it belonged to the protecting State." [1] It is the protecting State which controls, conducts, and carries out all foreign relations as if they were its own affairs, and the protectorate has no independent international status apart from the protecting State. This position exists irrespective of any arrangements that have been made for the internal government of the protectorate. A protectorate, how-

[1] MacDonell.

ever unjustly it may have been treated, has thus, according to the established usage, no right of appeal to the intervention or arbitration of such an international body or institution as the League of Nations.

These marks of a protectorate have been adopted by English lawyers, and effect has been given to them by decisions of the Judicial Committee of the Privy Council and other English Courts.

Sir H. Jenkyns says: "A British protectorate is a country which is not within British dominions, but as regards its foreign relations is under the exclusive control of the King, so that its Government cannot hold direct communication with any other foreign Power, nor a foreign Power with that Government." [1]

Hall says: "The mark of a protected State or people, whether civilized or uncivilized, is that it cannot maintain political intercourse with foreign Powers except through or by permission of the protecting State." [2]

In the case of *Rex* v. *Crewe*, which came before the English Court of Appeal, Lord Justice Kennedy said: "The one common element in protectorates is the prohibition of all foreign relations except those permitted by the protecting State. What the idea of a protectorate excludes, and the idea of annexation, on the other hand, would include, is that absolute ownership which was signified by the word *dominium* in Roman law, and which, though not quite satisfactorily, is sometimes described as 'territorial sovereignty.' The protected country remains, in regard to the protecting State, a foreign country; and this being so, the inhabitants of the protectorate, whether native-born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected

[1] *British Rule*, p. 165. [2] *Foreign Jurisdiction*, p. 218.

State become subjects of the protecting State."[1] This case arose with reference to the Bechuanaland Protectorate, and it was decided that the protectorate was not part of the dominion of the Crown, but was foreign territory. Accordingly, the English writ of *habeas corpus* did not run in the protectorate.

In the appeal of *Sobhuza II* v. *Miller*, Lord Haldane, delivering the opinion of the Judicial Committee, adopted the foregoing statement of Sir H. Jenkyns in substance, saying: "In the general case of a British protectorate, although the protected country is not a British Dominion, its foreign relations are under the exclusive jurisdiction of the Crown, so that its Government cannot hold direct communication with any other foreign Power, nor a foreign Power with its Government." In consequence, the results were the following: "The protected State becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which International Law imposes on him to protect within it the subjects of foreign Powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector or protected. But beyond this, it may happen that the protecting Power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. . . . The Foreign Jurisdiction Act appears to make the jurisdiction acquired by the Crown in a protected

[1] (1910) 79 L.J., K.B. 874; also at (1910) 2 K.B. 576.

country indistinguishable in legal effect from what might be acquired by conquest." [1]

The establishment of protectorates by Great Britain over uncivilized or unorganized countries, like a similar policy on the part of certain European Powers, was begun in comparatively recent times. In Europe there was formerly a British protectorate over the Ionian Islands, which were, however, made part of Greece in 1864. From about 1878 onwards, Great Britain and the Powers established "spheres of influence" in Africa, where it was thought that some sort of control was necessary to protect weak tribes against aggression by their neighbours or by slave traders, or where the existence of uncivilized people in territory adjoining European settlements or colonies menaced the security of such settlements, or where the object, barely disguised, was to prevent another Power from stepping in and annexing territory. These spheres of influence gradually developed into protectorates. It must be remembered, however, that the term "sphere of influence" has a twofold significance. On the one hand, it is applied to a country in respect of which a Power has entered into treaties with other Powers that they shall not exercise control or influence there, the former Power alone being entitled to exercise influence, as to matters enumerated in the treaty. Here, the country which is a "sphere of influence" remains independent, and may even have foreign relations, except in so far as they encroach upon matters defined in the treaty. This has been the case with Persia, which is not a British protectorate. On the other hand, the term, as applied to native territories which do not come within the international comity of nations, means that the State which exercises "influence" has control of the foreign relations of the territory, and sooner

[1] (1926) A.C. p. 522.

or later comes to exercise jurisdiction, in whole or in part, with regard to its internal affairs. The "spheres of influence" in Africa have all become protectorates.

Certain of the Native States of India were formerly classed as "protected States," and they are now defined as being under British suzerainty, suzerainty implying control over foreign relations, and being hardly distinguishable from protection. We have seen that in their internal affairs the British Government, acting through the Government of India, exercises a greater or a less degree of supervision. They are not, however, regarded as protectorates in the sense in which the term is applied to territories in Africa or to certain islands in the Pacific, although they would conform to the test applied by International Law, namely, that their foreign relations are conducted by, and subject to the control of, Great Britain.

Before 1890, control of the British Government over a native protectorate or sphere of influence was a pure act of State on the part of the Crown, signified and exercised by an Order in Council—such an act of State, as we have seen, not being examinable, i.e. open to question, by any English court.

Owing to the extension of the system of protectorates, the Foreign Jurisdiction Act was passed in 1890.[1]

The Foreign Jurisdiction Act recites that "by treaty, capitulation, grant, usage, sufferance, and other lawful means the King [at that time, the Queen] has jurisdiction within divers foreign countries," and that it is expedient to consolidate the Acts relating to the exercise of the jurisdiction of the Crown out of the British Dominions.

It then enacts that it is and shall be lawful for the King to hold, exercise, and enjoy any jurisdiction (which, under sec. 16, includes "power") which His Majesty now has or at

[1] 53 & 54 Vict., c. 37.

any time may have within a foreign country in the same and as ample a manner as if that jurisdiction had been acquired by the cession or conquest of territory (sec. 1). Where a foreign country is not subject to any Government from whom the King might obtain jurisdiction as recited by this Act, the King shall by virtue of this Act have jurisdiction over his subjects for the time being resident in or resorting to that country (sec. 2). Every act and thing done in pursuance of any jurisdiction of the King in a foreign country shall be as valid as if it had been done according to the local law then in force in that country (sec. 3).

If in any civil or criminal proceeding in a court in any of the King's Dominions or held under His Majesty's authority any question arises as to the existence or extent of the jurisdiction of the King in a foreign country, a Secretary of State shall, on the application of the court, send to the court within a reasonable time his decision of the question, and his decision shall for the purposes of the proceeding be final (sec. 4). This section really has for its object the obtaining of evidence as to the law of the foreign country.

The King may by Order in Council direct that certain enumerated statutes, or amendments to them, shall extend, with or without modification, to any foreign country in which for the time being His Majesty has jurisdiction; and thereupon those enactments shall operate as if the country were a British possession, and as if the King in Council were the legislature of that possession (sec. 5).

Power is given to issue warrants to send persons charged with offences cognizable by a British court for trial in any British possession designated by Order in Council, and to provide for places for the punishment of convicted persons, and any removal or deportation of a person is made as lawful

and is protected as if it took place wholly within the foreign country (secs. 6, 7, 8). The King may assign jurisdiction to British courts to deal with cases arising in the foreign country (sec. 9).

Orders in Council under the Act must be read subject to Acts of Parliament dealing with British subjects in the foreign country (sec. 12).

The Act defines "foreign country" as "any country or place out of His Majesty's Dominions" (sec. 16). It is well understood, however, that it does not apply to independent foreign Powers, but to States or territories which have been placed under the protection of the British Crown. Orders under the Act may extend to the subjects of Native States in India (sec. 15).

The effect of this Act is to give the Crown complete control of, and discretion over, matters relating to a protectorate. The jurisdiction of the Crown is exercised by Order in Council, which ordinarily confers powers of administration and government upon an officer designated in the Order, who is usually known as a Resident Commissioner, though sometimes designated High Commissioner. In South Africa each native protectorate is administered by a Resident Commissioner, who is subordinate to and also acts under the directions of the High Commissioner for South Africa. In certain cases a native protectorate is placed under the administration of the Government of an adjoining colony, e.g. the Protectorate of Nigeria, which is under the Government of the colony of Nigeria. Orders in Council may still be issued independently of the Act of 1890.

There are certain protectorates where the British Government, which exercises its jurisdiction through the Colonial Office, does not interfere, or interferes in only a slight degree, with internal affairs. These protectorates are usually described

as "independent States under the protection of Great Britain." This phrase, for example, is used in the case of Sarawak.

In recent years, however, it has become the practice, in the case of the African protectorates, for the British administration to take entire charge of the internal affairs of the protectorate, including the establishment of courts of justice in the protectorate, leaving to the original inhabitants, i.e. the native chiefs and their subjects, a greater or less degree of occupation and control of the lands held by them and a certain amount of jurisdiction in purely tribal matters. There is, however, no restriction on the degree of control or the powers of government exercised by the protecting Power, and it may issue Orders in Council, or alter or revoke them, as it sees fit. "The Crown could not, excepting by statute," says Lord Haldane (*Sobhuza II* v. *Miller*, above), "deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders." There is nothing, even, to prevent the British Government, as long as it is not restrained by the express terms of a statute, from departing from or ignoring its previous declarations of policy with regard to the territory. This has happened with regard to Swaziland. In 1879, the Swazis assisted the British administration in the Transvaal during the Secocoeni War, and Sir Evelyn Wood, on behalf of the British Government, assured them that they would retain their independence. Effect was given to this assurance by the Convention of Pretoria (1881) and the Convention of London (1884), which stipulated the independence of Swaziland. After the Anglo-Boer War, however, a British protectorate was established in that country, and the British Government, through the High Commissioner for South Africa, assumed complete control. The Judicial Committee, as stated above, decided that this was an act of State which could not be questioned.

The following is a list of the British protectorates, with a brief statement of their mode of government:—

In Africa.

Ashanti and the Gold Coast Territories. Each under a Chief Commissioner, subordinate to the Governor of the Gold Coast. To them has been added the mandated territory of Togoland, the northern portion of which is administered as part of the Gold Coast Protectorate, and the southern as part of the Gold Coast Colony.

Sierra Leone, administered by the Government of the colony of Sierra Leone, whose Legislative Council has jurisdiction over the protectorate.

The Gambia, administered by the Government of the colony of the Gambia in the same way as Sierra Leone.

Somaliland, administered by a Commissioner, now styled Governor.

Uganda, administered by a Governor.

Kenya. The territories comprised in the former East African Protectorate were annexed on July 23, 1923, and became the colony of Kenya. The Kenya Protectorate now consists of the former dominions of the Sultan of Zanzibar, with a resident officer at Zanzibar, and under the general control of the Governor of Kenya, who is High Commissioner for the protectorate.

The former protectorates of North-Eastern Rhodesia, Nyasaland, North-Western Rhodesia, and Barotseland now constitute the colony of Northern Rhodesia (as from April 1, 1924).

Southern Rhodesia, also, is now a Crown colony. Its government, formerly, was of a composite description. It was administered by a Chartered Company, the British South

Africa Company, which nominated an administrator, who was assisted by a Resident Commissioner appointed by the Colonial Office, both being subordinate to the High Commissioner for South Africa. In effect, it was a protectorate, being administered under Orders in Council issued under the Foreign Jurisdiction Act, 1890, and the rights of the natives to land were treated in the same way as in other African protectorates, subject to modifications contained in the Company's charters of 1889 and 1898. For this reason certain matters relating to land rights in this territory, formerly administered by the Chartered Company, are dealt with in this chapter.

Protectorates under the South African High Commission. These are Basutoland, Bechuanaland, and Swaziland. Each is administered by a Resident Commissioner, who is subject to the direction of the High Commissioner for South Africa, who, at the same time, holds the office of Governor-General of the Union of South Africa. The South Africa Act, 1909, contemplates the ultimate incorporation of these protectorates in the Union, although no formal steps have, thus far, been taken to give effect to this. In Basutoland there is a native advisory council for native affairs. In Bechuanaland there are native and European (i.e. white) advisory councils for native and white affairs respectively. In Swaziland there is a European advisory council, but no native advisory council.

Nigeria. This protectorate, which formerly consisted of two protectorates, Northern Nigeria and Southern Nigeria, is now combined, and is administered together with the colony of Nigeria by a Governor and Commander-in-Chief, assisted by an Executive Council and a Legislative Council.

The government of Nigeria has afforded a field for a typical application of colonial policy. Mr. Ormsby-Gore, Parliamentary Under-Secretary for the Colonies, said, in a lecture before

the Royal Geographical Society (March 1927): "As far as British administration is concerned, Nigeria has become the *locus classicus* of the principle of 'indirect' rule. From the very commencement of our rule in Northern Nigeria we have governed the country through the Emirates and their organized native administrations. We have left the administration of justice as far as possible to native courts practising their own law. Ancient systems of taxation have continued. The administration of the Yoruba Provinces has subsequently been very largely modelled on the system in vogue in the north. We guide and direct government through the chiefs and their indigenous native organizations."

Egypt was formerly a protectorate, established on December 18, 1914; but on February 28, 1922, by "unilateral declaration," i.e. on the part of Great Britain alone, its independence was recognized, subject to reservations concerning (1) the security of British Empire communications, and more particularly the Suez Canal; (2) the defence of Egypt against foreign interference; (3) the protection of foreign interests and minorities; and (4) the Sudan. It will thus be seen that, in a strict international sense, Egypt is not independent. On the other hand, nominally at least, it is not a protectorate. It is not governed by British Orders in Council, but has its own Parliament, which makes its own laws.

In Asia and the Pacific.

Federated Malay States. This is a protectorate based on agreements with the Governments of four formerly independent native States, Perak, Salangore, Negri Sembilan, and Pahdang, whereby they agreed to accept a British Resident-General, who is under the Governor of the Straits Settlements as High Commissioner. Each State has its own native Government,

but its external affairs are administered by the British Government, and in each there is a Resident with jurisdiction over British subjects within the territory. He has a seat on the State Council, the supreme authority in the State. Each Resident is under the Resident-General. Each State is administered, as far as possible, on the model of a British Crown colony. The federation also includes the protected States of Kelantan, Trengganu, Kedah, and Perlis, transferred to the British Government by the Siamese Government by treaty of March 10, 1909.

Borneo Protectorate. This consists of Brunei, North Borneo, and Sarawak, and is also under the Governor of the Straits Settlements as High Commissioner. North Borneo and Sarawak are in the exceptional position of being ruled, internally, not by native but by British rulers, the former being under the British North Borneo Company, which acts by a court of directors sitting in London and appoints a Governor, and the latter by the Rajah of Sarawak, an Englishman, whose predecessor in title acquired his rights by various concessions from the Sultan of Brunei.

Johore is a native State at the southern extremity of the Malay Peninsula, internally independent, but protected by Great Britain, for which the Governor of the Straits Settlements is also the channel of communication with the British Government.

Western Pacific. The Governor of Fiji is High Commissioner for the protectorate of the Western Pacific, which includes all islands in that ocean not within the limits of Fiji, New South Wales, Queensland, New Zealand, or under the protection of any foreign Power. It includes the Tongan or Friendly Islands, Savage Island, the Banks and Torres Islands, and the New Hebrides, which last, however, is administered under

a *condominium* with the French Government. The protectorate of the Gilbert Islands and the Ellice Islands, however, was formally annexed and made a British Crown colony by Order in Council in 1915.[1]

In the case of those protectorates whose internal government is independent, as above stated, there is, as a rule, no interference by the British Government in internal affairs, and, if any trouble arises, the British Government would have resort in the first instance to representations by its Agent or High Commissioner, in the same way as representations were made by the British High Commissioner regarding the attitude of the Egyptian Prime Minister, Zaghlul Pasha, and the murder of Sir Lee Stack, the Commander-in-Chief of the Sudan, in 1925.

In the case of the other protectorates, namely, those in Africa, which are administered directly by the Governor or Resident Commissioner, their control, as above stated, is to all intents and purposes the same as that of a Crown colony, the administrator having full powers of internal government. Subject to the Orders in Council constituting the protectorate, he, like the Governor of a Crown colony, is "practically an autocrat who, subject to the control of the Colonial Office, exercises legislative and executive powers."[2] In practice, indeed, a Governor of a Crown colony, though nominally responsible to the Colonial Office, is almost unrestricted in the exercise of his powers, for the Colonial Office is dependent upon him for reports as to affairs within the colony, and he has to act in most cases according to his own discretion. In such protectorates, courts of civil and criminal jurisdiction

[1] Consult the various Orders in Council relating to the various protectorates; and see Halsbury, *ubi sup.*, vol. x, secs. 855, 885–99, pp. 504, 521–5, and supplement (1926).

[2] Chalmers and Asquith, pp. 175, 176.

have been established, and provision has been made for appeals to the Judicial Committee of the Privy Council in cases where a certain minimum amount is involved.

The most important questions which have arisen regarding internal affairs in protectorates are those which relate to the title to land formerly in the occupation of the native inhabitants, which has been claimed either by such natives or persons deriving rights from them, or on behalf of the Crown or by European settlers in the territory claiming the grant of rights under the Crown.

One of these cases arose in regard to the title to land in Southern Rhodesia, and was referred to the Judicial Committee for its decision in 1918 (*In re Southern Rhodesia*).[1]

This case involved the conflicting rights of the original native inhabitants, of the British South Africa Company (both under its original native treaties and under its Charter), of the Crown, and of the British settlers; but the principles relating to native land in protectorates and elsewhere in the British Dominions were involved, and a summary of the case may therefore be useful.

The British South Africa Company was incorporated by Royal Charter on October 29, 1889. On October 30, 1888, Lobengula, the King or Paramount Chief of the Matabele nation, granted a mining concession to C. D. Rudd, subsequently assigned to the Company, of the exclusive right to minerals throughout his entire territory. On November 17, 1891, Lobengula granted a concession to E. A. Lippert of the exclusive right "to lay out, grant or lease, for such period or periods as he may think fit, farms, townships, building plots, or grazing areas." This concession was bought from Lippert by the Company. In 1890 the Company sent a pioneer

[1] (1918) A.C. 211.

force to occupy Mashonaland. By Order in Council of May 9, 1891, power was given to the High Commissioner for South Africa to exercise in Mashonaland all powers and jurisdiction which Her Majesty, at any time before or after the date of the Order, had or might have within its limits, and from time to time by Proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of the Order. By Proclamation of June 10, 1891, the High Commissioner assumed jurisdiction, and it was provided that no occupation or ownership by any person of European birth or descent in respect of any land within the limits of the said Order, and no concession or grant of any right, title, or privilege to deal with or authorize the occupation or ownership of any such land, should be recognized as valid or legal, until approved in such mode as the High Commissioner should appoint; and that no concession theretofore or thereafter made by any native chief, and no document of procuration granted by any such chief, should be recognized by any court of law, unless and until sanctioned and approved by Her Majesty's Secretary of State. Nothing in the Proclamation was to abridge or impair the powers, privileges, authority, or jurisdiction of the High Commissioner or the British South Africa Company.

In 1893 Lobengula dispatched an *impi* against the Mashonas. The Company raised a force, and Lobengula abandoned his capital, Bulawayo, and subsequently died. "Not only were the Company's arms engaged, but also Crown forces, namely, the Bechuanaland Border Police. Those who knew the facts at the time did not hesitate to speak, and rightly so, of conquest, and if there was a conquest by the Company's arms, then, by well-settled constitutional practice, that conquest was on

behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it" (Lord Sumner).

In 1891 the Company's actual source of administration was the governing sovereign of the country, King Lobengula. In 1894 there was no native sovereignty under which it could exercise administration. In 1894 administration was established in Matabeleland (Lobengula's former domain) by the Matabeleland Order in Council. In 1898 the Southern Rhodesia Order in Council provided for a Legislative Council, consisting of nominated and elective members (Europeans). In 1902 the question was raised whether the Company should tax itself in proportion to the property and interests which it had in the territory.

On April 17, 1914, the Legislative Council passed a resolution that the ownership of the *unalienated land* in Southern Rhodesia had never vested in or been acquired by the British South Africa Company as its commerical or private property, and that its powers of dealing with or disposing of the land were created by the authority conferred by Orders in Council on the Company as the governing body charged for the time being with the general administration of affairs in the territory; that the ownership of the land was vested in the Company as an administrative asset only, and on the Company ceasing to be the Government of the territory all unalienated lands should be and remain the property of the Government of the territory.

The Company disputed these contentions, which were referred to the Judicial Committee. The natives were represented at the hearing. It was contended on their behalf that they were the owners of the unalienated land from time immemorial, and that it still belonged to them.

The Judicial Committee had to decide two main questions: (1) whether the title to the unalienated lands still belonged to

the natives; (2) whether it had passed to the Company or to the Crown.

As to the native claim, it was decided that the native rights in land were not private rights, and were at the disposal of the Crown when Lobengula fled and his dominions were conquered. If they were private rights, any actual disposition of them by the Crown upon a conquest would suffice to extinguish them, as manifesting an intention expressly to exercise the right to do so.

As to the Company's claim, it was said that the Company partly rested its claim on the Lippert concession. But it was held by the Judicial Committee that the concession did not give the concessionaire the right to use the land or take the usufruct (i.e. the income or fruits derived from it). If the Company was right, said Lord Sumner in delivering the opinion of the Committee, "it would follow that Herr Lippert was, or could become at pleasure, owner of the entire kingdom —for nothing is reserved in favour of the inhabitants—from the *kraals* of the King's wives to his father's grave, or the scene of assembly of his *indunas* and his *pitso*." In default of the Lippert concession the Company relied on long standing and undisturbed occupation. It was decided that "in itself and by itself occupation is not title." Its possession was equally referable to its administrative position under the Crown, and was not inconsistent with the recognition of the Crown's overriding title.

It was decided that "the true view seems to be that if, when the protecting power of 1891 became the conquering power in 1893, and under the Orders in Council of 1894 and 1898 set up by its own authority its own appointee as administrator and sanctioned a land system of white settlement and of no native reserves, it was intended that the Crown should assume and

exercise the right to dispose of the whole of the land not then in private ownership, then it made itself owner of the land to all intents and purposes as completely as any sovereign can be the owner of lands which are *publici juris*." Nowhere was there any express grant of the unalienated lands by the Crown to the Company.

The ownership of the unalienated lands had, accordingly, vested in the Crown, which held them both by conquest and because the original holding of the territory by the Company, as the administrator appointed by the Crown, was, like any other occupation by a British subject, for the Crown.

It should be noted that the territory was not annexed on its conquest, but was dealt with by Order in Council as a protectorate.

In 1921 there came before the Judicial Committee the case of the White Cap Chiefs of Nigeria, which raised the more important question of the nature of the native tenure of land. It is reported as *Amodu Tijani* v. *Secretary, Southern Nigeria*.[1]

An important principle was enunciated by Lord Haldane in delivering the opinion of the Committee: "In interpreting the native title to land, not only in Southern Nigeria but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title

[1] (1921) 2 A.C. 399.

of the Sovereign where that exists [in non-legal language, this means a mere right to occupy the land and enjoy its fruits, the actual ownership being with the chief or Sovereign]. In such cases the title of the Sovereign is a pure legal estate [i.e. the nominal legal title in the land belongs to the Sovereign], to which beneficial rights may or may not be attached."

In this case, the port and island of Lagos had been ceded to the British Crown. It was decided that the cession related primarily to sovereign rights only, and that the rights of property of the inhabitants remained (apparently on the ground that there had been no specific cession of those rights). The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary was established by the context of the treaty of cession or circumstances.

In the case, previously mentioned, of *Sobhuza II* v. *Miller*, the question at issue involved the title to land in Swaziland. Dealing with the true character of native title to land throughout the Empire, including South and West Africa, the opinion of the Judicial Committee contained this passage: "With local variations, the principle is a uniform one. It was stated by this Board in the Nigerian case of *Amodu Tijani* v. *Secretary, Southern Nigeria*, and is explained in the report made by Rayner, C.J., on Land Tenure in West Africa, quoted in the case referred to. *The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual.*[1] The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is Sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the act of

[1] The italics are mine.—M. N.

a paramount Power which assumes possession or entire control of the land."

In this case the land in question had been granted by the former native King of Swaziland to concessionaires, who ceded their rights to the respondent. Subsequently, after the assumption of British jurisdiction in Swaziland, the concession was expropriated by the High Commissioner, and, under the Crown Lands Order in Council of 1907, one-third of the land affected by the concession was granted to the natives and two-thirds were granted to the former concessionaires in freehold. The petitioner claimed the ejectment of the respondent from the land granted to him under the Order in Council, which, it was alleged, was occupied by natives. The court in Swaziland refused an order of ejectment, and this decision was sustained by the Judicial Committee.

The power of the Crown to enable the High Commissioner to deal with the land "was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a court of law."

This case is, accordingly, of importance, both as re-stating the principles relating to native land tenure and as affirming the right of the Crown to deal at discretion with internal affairs in a protectorate.

CHAPTER VI

THE MANDATED TERRITORIES

UNDER Article 22 of the Covenant of the League of Nations, which forms part of the Treaty of Versailles (June 28, 1919), certain members of the League were entrusted with a Mandate to administer particular territories on behalf of the League. These were colonies and territories which had ceased to belong to the conquered States (particularly Germany and Turkey) as a result of the Great War (1914–18). They were "inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world." The tutelage over them was to be entrusted to advanced nations who by reason of their resources, their experience, or their geographical position could best undertake and were willing to accept this responsibility, to be exercised by them as Mandatories on behalf of the League. The character of the Mandate must differ according to special conditions.

Certain former possessions of Turkey had reached a stage of development where their independent existence could be provisionally recognized, subject to administrative advice and assistance by a Mandatory until they were able to stand alone. The wishes of such communities must be a principal consideration in selecting a Mandatory.

Other peoples, especially those of Central Africa, were at such a stage that the Mandatory must be responsible for their administration, under conditions guaranteeing freedom of conscience and religion, but subject to the maintenance of public order and morals, prohibition of abuses such as slave

trade, arms traffic, and liquor traffic, and the prevention of the establishment of fortifications, military and naval bases, and military training of natives other than for police and territorial defence purposes—equal trading and commercial opportunities being secured for other members of the League.

Certain territories, such as South-West Africa and certain of the South Pacific Islands, owing to the sparseness of their population, their small size, their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, could be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory must render to the Council of the League an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory, if not previously agreed upon by the Members of the League, was to be explicitly defined in each case by the Council of the League.

A permanent Commission (since known as the Permanent Mandates Commission) was to be constituted to receive and examine the annual report of the Mandatories and to advise the Council on all matters relating to the observance of the Mandates.

For the purpose of giving effect to Article 22 of the Covenant, Mandates have been entrusted to Great Britain and certain of the self-governing Dominions. These are:—

To Great Britain.—Palestine and Mesopotamia—both formerly Turkish.

German East Africa (part), now called Tanganyika, and placed under a Governor.

Kamerun (part) and Togoland (part)—formerly German. The northern part of Togoland is administered as part of the Gold Coast Protectorate, and the southern part as part of Gold Coast Colony.

Nauru Island—formerly German.

To the Commonwealth of Australia.—New Guinea (formerly German New Guinea).

To New Zealand.—Samoa.

To the Union of South Africa.—South-West Africa (formerly German South-West Africa).

The territories of the Hedjaz, Iraq, and Trans-Jordania have been placed under Arab rulers, nominally independent, but under the tutelage of Great Britain, as falling under the denomination of "people not yet able to stand by themselves."

The territories under British mandate are governed in the same way as native protectorates, that is to say, to all intents and purposes as Crown colonies, under Orders in Council.

In a case which arose with regard to Palestine (*Jerusalem-Jaffa District Governor* v. *Suleiman Murra*), it was laid down by the Judicial Committee of the Privy Council that jurisdiction under the Palestine Mandate is jurisdiction in a foreign country within the description in the preamble to the Foreign Jurisdiction Act, 1890 (see Chapter IV).[1] This, presumably, applies to the other territories administered by Great Britain as Mandatory.

The territories entrusted under mandate to the self-governing Dominions are administered by them as "integral portions" of their territory. This is, in effect, an international recognition (at least by the Members of the League) that the Dominions have extra-territorial jurisdiction. The Dominions have, as a matter of fact, passed laws for the government of the mandated

[1] (1926) A.C. 321.

territories entrusted to them. The local government is carried on by administrators appointed for the purpose by the Mandatory.

Although the Mandates are said to be in the nature of a trust, and reports concerning their administration must be rendered to the Mandates Commission, they are nevertheless, according to statements made by the British Government, irrevocable in their nature, and therefore permanent.

In the case of both the territories which "are at such a stage that the Mandatory (i.e. Great Britain) must be responsible for the administration of the territory," and those which "can be best administered under the laws of the Mandatory (i.e. a self-governing Dominion) as integral portions of its territory," it would appear, on the construction of Article 22, that the Mandatory could never grant complete independence, i.e. autonomy, both internal and external, to such a territory. The terms of each Mandate, as granted by the Council of the League, in fact provide that the consent of the Council is required for any modification of the terms of the Mandate. This, on the other hand, would appear to prohibit (unless with the consent of the Council) any direct annexation of the mandated territory to the Mandatory's own territory.

The Mandates also provide that any dispute between the Mandatory and another Member of the League relating to the interpretation or application of the Mandate is to be submitted to the Permanent Court of International Justice at The Hague.

In a case which came before the Appellate Court of the Union of South Africa it was decided that the sovereignty over the mandated territory resided in the Mandatory.[1]

[1] *Rex* v. *Christian*, (1924) A.D. (South Africa), p. 101.

PART II

DIVISION AND EXERCISE OF GOVERNMENTAL POWERS

CHAPTER I

THE CROWN

MANY authors have made comparisons between the Roman Imperial system and that which, as previously indicated, has evolved within recent years into the British Commonwealth of Nations. Superficially, there are certain points of resemblance between the two; though the probability is that there are more lines of divergence. The Roman Empire was essentially an empire of conquest, all of whose parts came under a highly centralized military system, whose outliers were essentially military outposts. It was the policy of the Roman rulers not merely to bring all their conquests into subjection to Rome, but to reduce them to one level of uniformity in respect of law, as well as of culture. While a great part of the British Empire has been acquired by conquest, the principal aim has been to develop subject territories by leaving each of them, as far as possible, to evolve its own local life and government, under forms adapted to the special circumstances of each part. Nevertheless, the main outlines of constitutional government have largely been founded upon the model of that prevailing in England. The outline is the same, but the details have varied with time and place—so that, as we have seen, there have been different forms of government at different periods in one portion of the Empire, while, on the other hand, at one and the same time diverse forms of government will be found in different parts existing side by side. Down to the latest times, one and the same system of government was imposed on the various parts of the Roman Empire, and everything depended upon the will of the sovereign power at the centre, that of

the emperor and the senate in the first instance, and that of the emperor alone in later years. Viscount Bryce has stated that "inquiry would show us the fact that the progress of Rome from a republic, half oligarchic, half democratic, to a despotism, did not prevent the phenomena which mark the evolution of its legislation from bearing many resemblances to the evolution of legislation in England, where progress has been exactly the reverse, viz. from a strong (though indeed not absolute) monarchy to what is virtually a republic half democratic, half plutocratic." [1] The British Empire also began with a centralized system of government, although, as Viscount Bryce elsewhere points out, in dealing with the special position of India, "the remoteness of India has had results of the highest moment in making her relation to England far less close than was that of Rome to her provinces." [2] But centralization and uniformity have never been carried to such logical extremes in the British as in the Roman Empire. The Roman system, in the sphere of constitutional law, was essentially rigid; in private law, although it ultimately came to assume the form of a code, it was much more elastic, a circumstance which, with others, accounts for the survival of Roman private jurisprudence in countries where the English common-law system does not prevail, and for its adoption as the basis of codified law on the Continent of Europe. The rigidity of the Roman constitutional system had much to do with its ultimate breakdown. Whether on account of the secession of the American colonies or for other reasons, the dangers of such a system, fortunately from the British point of view, were perceived before it was too late. Whatever the reasons, the British constitutional system has in the course of time become

[1] *Studies in History and Jurisprudence*, Essay XIV, vol. ii, p. 247.
[2] *Ibid.*, vol. i, p. 8.

much more elastic, with the result that, as above stated, the most diverse systems of government have been enabled to coexist within the larger framework of the British Commonwealth. This freedom in the application of constitutional principles has been accompanied by the continuance of varying systems of private law, which, according to settled principles of English law, or rather legal policy, have been allowed to survive in those portions of the British Empire which were conquered from other nations, and at the time of their conquest were already in possession of their own systems of private law. In regions which have been settled by Englishmen, such as Australia, for example, which contained no civilized population at the time of their first settlement, the English system of private law has been introduced. The result is that, in great areas which nevertheless are within the British Empire, such as India, Ceylon, and South Africa, systems of private law wholly different from that of England exist and flourish. Throughout the Roman Empire there was one basic system of private law, although it might vary in detail owing to the judicial discretion which was confided to the prætors. The edict of the Roman emperor was valid for the whole Empire, whether promulgated by him or by his prefects at Rome or at York. The great contribution of Rome to civilization was made in the sphere of private law. The great contribution of England has been the establishment, throughout the British Dominions, of constitutional government, using the term not as indicating the mere possession of a constitution, even though unwritten, but as signifying the application of certain well understood principles of liberal government.

These principles are ordinarily summed up in the statements that the British system is a limited monarchy, and that it consists in parliamentary government. The government of

Great Britain has in course of time developed from one founded upon the practically irresponsible expression of the will of the ruler to one in which certain limitations, with the assent of the ruler himself, have been placed upon his powers. It was the failure of the Roman emperors, on the one hand, to perceive the necessity for such limitations, and, on the other, to hold and to exercise the power which they pretended to assert, that led ultimately to the dissolution of their Empire. It is the great merit of the British system that, with the maintenance of the monarchy, room has been found for the creation and the enlargement of representative institutions throughout the British Commonwealth of Nations. In Rome, on the other hand, "of the introduction of any free institutions for the Empire at large, or even for any province as a whole, there seems never to have been any question. Among the many constitutional inventions we owe to the ancient world, representative government finds no trace. . . . So it befell that monarchy and a city republic or confederation of such republics remained the only political forms known to antiquity." [1]

Although the basis of the British constitutional system is that which we know as parliamentary, Parliaments do not exist everywhere within the British Commonwealth, and while in certain parts the action of the Parliament is direct, where a local legislature exists for any such part, in other parts it is indirect, that is, through a local government without a Parliament which ultimately is answerable to the British Parliament, which in turn is representative of the will of the electors in Great Britain. Where there are local responsible legislatures, the British or Imperial Parliament is in theory supreme, but in effect it has ceased to exercise any control over the action of such legislatures. On the other hand, the Crown is, for each

[1] Bryce, *ubi sup.*, vol. i, p. 32.

and every part of the British Commonwealth, one and the same. With diversity in the forms of government throughout the Commonwealth, there is unity. That unity consists in the existence of the Crown as a common or universal factor in the whole fabric of the Empire as well as in each of its separate parts. Whatever extensions of territory have taken place, whatever forms of government have been introduced, the headship of all of them has at all times resided in the Crown.

Thus the Crown is the centre and the symbol of Imperial unity. It has often been said that the Crown is the link that binds the Empire. This is no mere figurative or sentimental statement, but is strictly true in a constitutional sense. Mr. Marriott points out that there are five constitutional links between the oversea possessions and Great Britain. These are: (1) The King in Parliament is Sovereign not only in the United Kingdom, but throughout the Empire. In theory, he can legislate for the Australian Commonwealth and the Canadian Dominion, precisely as he can for India or Gibraltar or Scotland or Wales. In practice he does legislate, to a considerable extent, to secure objects which are common to the Empire as a whole, but which are beyond the competence of any given colonial legislature. A long series of Acts relating to Merchant Shipping affords a good instance of this. The Imperial Parliament, again, is a constituent legislature for the Empire; the existing constitutions of Canada, Australia, and South Africa are all based upon the statute law of the United Kingdom.[1] Or, again, the Imperial Parliament intervenes to

[1] It would be more strictly accurate to say "every one of these constitutions *is* a statute of the United Kingdom." Lord Courtney also says (*ubi sup.*, p. 284): "Every step in the development of a colony has been made directly or indirectly under the sanction of the Imperial Parliament. The authorization of its constitution has been effected by an Act of Parliament. . . . Legally all colonial constitutions derive their origin from Parliament, and live and move with its permission." But see the following part of the text.

validate doubtful Acts passed by colonial legislatures. The legislative authority of the Imperial Parliament is therefore a reality. (2) The King of Great Britain [and Ireland] is throughout his Dominions supreme. That supremacy is exercised in several ways. Of these, two are particularly important: the King may veto or disallow any Act passed by a colonial legislature, even though it has received the assent of his representative—the Governor; or he may instruct the Governor to interpose his veto upon legislation. The Crown is also, for all parts of the Empire, the sole fountain of honour. (3) The Crown still appoints all colonial Governors. (4) Questions of foreign policy, and particularly questions of peace and war, are entirely under the control of the Home Government. (5) From all the oversea Dominions, whatever their grade in the Imperial hierarchy, there lies an appeal to the Judicial Committee of the Privy Council.[1]

Certain of the foregoing propositions, however, require modification, in the light of recent developments. As to (1), there is no doubt regarding the supremacy of the King in the British Commonwealth. But the expression "King in Parliament" is now applicable not merely to the King as part, constitutionally, of the Imperial Parliament, but also to the King with the Parliament of each of the self-governing Dominions. In respect to each such Dominion the King in Parliament means the King and the Parliament of that Dominion. The King in his Imperial Parliament no longer legislates for a Dominion, in practice, and even in theory, when effect is given to the Dominions Report of 1926, there will be no longer any *right* in the Imperial Parliament so to legislate. It is now fully admitted, in constitutional practice, that even the declaring of war and the making of peace, in

[1] Marriott, *Eng. Political Institutions*, p. 329.

order to bind a particular Dominion, must be assented to by the Parliament of that Dominion. It is true that there are still certain matters in respect of which, as a matter of convenience, the Imperial Parliament legislates for the British Commonwealth as a whole; but the growing practice is to obtain the assent of each self-governing Dominion, which, in the last resort, means the assent of its Parliament. While, also, it is true that the constitutions of the Dominions have been enacted by the Imperial Parliament, this was necessary in order fully to set going the constitutional machinery of each Dominion. Once that process has been set on foot, each Dominion becomes master in its own household, subject, of course, to the King as its head; and with the attainment of Dominion status (as explained in Part I, Chapter II) it is free of the intervention of the Imperial Parliament, which, if the Report of 1926 be adopted in practice in its entirety, will have no supremacy of any kind over the Dominion. As explained elsewhere, the constitution of a Dominion does not consist merely of the statute conferring its original powers, but of certain conventions as well, of which those whereby Dominion status has been attained are examples. It is true that the legislative authority of Parliament is a reality in the case of the non-self-governing colonies, and that it can validate the Acts of the legislatures of such colonies; but once there is Dominion status it is in the highest degree doubtful whether the Imperial Parliament can validate an invalid Act of the Dominion. This may give rise to difficulties in practice, although cases of the kind rarely occur. It may be added here, on the authority of the late Mr. Dicey (*Law of the Constitution*, 8th ed., p. 29), that the Imperial Parliament does not concede to any Dominion or to the legislature thereof the right to repeal (except by virtue of an Act of the Imperial Parliament) any Act of the Imperial

Parliament applying to a Dominion. As to (4), we have seen that the Dominion Report of 1926, while laying down that theoretically each Dominion has a voice in foreign affairs in so far as they concern itself, lays down that for the time being, for reasons of convenience, such matters must be conducted through the medium of the British Foreign Office. Of course, the control of the Imperial Army and Navy rests with the British Parliament, which pays for them. As to (5), even the question of appeals to the Judicial Committee, as indicated in the Dominions Report, is under consideration.

These modifications, however, have not weakened but have strengthened the position of the Crown in relation to the Dominions, and, by consequence, to the British Commonwealth of Nations as a whole. Since the Imperial Parliament is no longer assumed to have legislative authority with regard to a Dominion, the only supreme authority over the Dominion is the King, who approves or vetoes the Acts of the Dominion legislature, and to whom the allegiance of subjects in the Dominion is directly due. The position of the Crown in relation to a Dominion has become enhanced, and that of the Imperial Parliament in relation thereto has been correspondingly weakened, if not nullified.

In relation to the Imperial Parliament itself, the position of the Crown has been strengthened. At one time, it is true, the King of England was, to all intents and purposes, an absolute monarch. There followed a period when the Parliament was supreme. This was followed by the institution of limited monarchy, all executive acts being done in the King's name by Ministers responsible to Parliament. But not only is the person of the Sovereign clothed with supreme sovereignty and pre-eminence, not only do many statutes declare him to be the only supreme head of the realm in matters both spiritual

and temporal, but the Crown is a necessary party to legislation, and not only must the King assent to every Bill, but he may veto any Bill. Neither House of Parliament, whether acting alone or in conjunction with the other House, has any power of legislation without the Crown.[1] If the monarchy is limited, the legislature, considered apart from the monarchy, is also limited. It is, of course, true that the legislature might conceivably declare that its will prevails over that of the Crown, in certain circumstances, but such a declaration would not be constitutional, even though the legislature might have the power to carry its will into effect.

While one cannot point to any statutory or constitutional declarations on the subject, there can be no doubt that within recent times the position of the Crown relatively to the legislature, in Great Britain, has been strengthened. As to its relations with the Dominions, evidence is afforded by the resolutions of the various Imperial Conferences, to which, and to whose results in practice, reference has been made (see Part I, Chapter II).

It is of importance to notice, however, that the Dominions and their legislatures have nothing to say with regard to the position or dignity of the Crown. They were, in their earliest stages, the creation of an act of the Crown, and, later, of enactments by the Crown with the Imperial Parliament. The title of the Crown is in no way regulated or settled by a Dominion Parliament; and the same applies to the succession to the Crown. The existence of the Crown is not dependent upon the consent of the Dominions, or upon the existence of any theoretical "social contract" or compact between it and the Dominions. The Crown existed not only before the Dominions and the other colonies, but before the British Parliament itself.

[1] 1 Blackstone, *Com.*, 14th ed., 241; various statutes; Halsbury, *ubi sup.*, vol. vi, secs. 547, 582, pp. 373, 388.

Relatively to Great Britain and the British possessions as a whole, one of the cardinal attributes of the monarchy is its antiquity.

With the antiquity of the monarchy is associated its continuity. Notwithstanding the vicissitudes it has undergone by various usurpations, and its temporary cessation during the period of the Commonwealth, the monarchy has survived. It is noteworthy, also, that every usurping occupant of the throne, however shadowy his right to it may appear to have been, has rested his title either on express grant—which implies the consent of a predecessor or of his subjects—or on descent. The assumption of regal power by William I was plainly based upon conquest, but he rested his title upon (1) an alleged appointment by Edward the Confessor—which, however, was revoked, apart from which "a king of the English had never possessed a constitutional right to bequeath his kingdom like a private estate"; and (2) election by the Witan, followed by the usual compact with the nation embodied in the ancient Coronation oath. This election has been regarded by authorities on the history and government of England as strictly constitutional. "The continuity of the English constitution was not broken by the Norman Conquest. That event ought to be regarded not as a fresh starting-point, but as 'the great turning-point' in the history of the English nation. 'The laws, with a few changes in detail, remained the same; the language of public documents remained the same.' The powers of King and Witan remained constitutionally the same under William as under Edgar." [1] The matter is of some practical importance as far as laws and institutions are concerned; with regard to the actual existing order of succession to the throne it is

[1] Taswell-Langmead, *ubi sup.*, pp. 38–9, quoting Freeman, *Norm. Conq.*, i, 72. Thierry, *Norm. Conq.*, throughout regards William I and his successors of the Norman and the Angevin lines as usurpers, and is invariably hostile to the Normans.

largely academic, as that has been settled by various Acts of Parliament, culminating in the Act of Settlement.

The personal character of the monarchy, after William the Conqueror, Henry II, and the First and Third Edwards, was strongest under the Tudors. Under the Stuarts it declined, and it appeared to have been extinguished by the Commonwealth. But though there was no effective revival of personal monarchy, the monarchical principle sprang up again with the Restoration. "The Restoration of 1660 had a threefold significance: (1) it marked the triumph of the monarchical idea; (2) the triumph of parliamentary government; and (3), above all, the negation of the military principle." [1] It may seem, at first sight, paradoxical to say that parliamentary government was revived at the Restoration, as it was the Parliament that had overthrown Charles I. But the constitutionalism of Parliament had given way to the Cromwellian dictatorship, which was as absolute as that of any monarch or uncontrolled despot, and marked the triumph of "the military principle." [2] The monarchical idea, after the constitutional settlement under William III and the philosophical speculations of the mid-eighteenth century, really revived under George III, to decline again under George IV and William IV. It revived once more under Victoria, the personal dignity of the wearer of the Crown being enhanced by the assumption of the title of Empress of India.

The maxim "the King never dies" is dependent not so much on the historical continuity of the monarchy as on the theory that there is never any lapse in the occupation of the Crown, and that, to prevent any failure in the exercise of the Royal powers and functions, they are legally assumed to continue

[1] Marriott, *ubi sup.*, p. 58.

[2] The attempt of the Cromwells to create a family dynasty has hardly been brought into sufficient prominence.

without a break. It is a strictly legal maxim.[1] The occupancy of the Crown is continuous in the eyes of the law. This doctrine, however, was only accepted gradually, for the title was originally elective, and the notion of hereditary right grew up in the course of time.[2] And embodied in the principle of hereditary succession was the doctrine that the exercise of the Royal power was continuous—there being no such thing as the *hereditas jacens* of Roman law. The Act of Settlement finally established the rule that the heir begins to reign at the moment of the ancestor's death. Consequently, as Maitland remarks, "the Coronation oath does not seem to be a legally necessary ceremony." [3] The necessity of taking the oath, however, and its terms, are fixed by statute.[4]

Under the same Act every king or queen must make and subscribe a declaration against transubstantiation, and must join in communion with the Church of England; and, under the Union with Scotland Act (1706), he or she must take and subscribe the oaths for the preservation of the Established Church in England and the Presbyterian Church in Scotland.

Older controversies in regard to the nature of the succession to the Crown and the title thereto were set at rest by the Bill of Rights, followed by the Act of Recognition. On the abdication of James II, the Convention Parliament met, though irregularly from a constitutional point of view, for it was summoned by the Prince of Orange, who was not then the reigning sovereign. It drew up the Declaration of Right (subsequently enacted as the Bill of Rights, 1688), by which the Crown was settled upon William and Mary, and thereafter

[1] *Calvin's Case*, 7 Co. Rep. 10 b, 11; 3 Co. Inst. 7, 4 do. 156; Stephen *Comm.*, 14th ed., 2, 485.

[2] Halsbury, *ubi sup.*, vol. 6, secs. 463, 467, 551, pp. 321, 325, 375.

[3] *Const. Hist.*, p. 343.

[4] Act of Settlement (1700), 12 & 13 Will. III, c. 2, sec. 2.

to the heirs of the body of Mary, to the Princess Anne of Denmark and the heirs of her body, and to the heirs of the body of William, Prince of Orange. The Acts of the Convention Parliament were subsequently ratified by the Act of Recognition (March 22, 1690), passed by a Parliament summoned in regular form by the King, which declared that the King and Queen were king and queen, and that the statutes made by the Convention were and are laws and statutes of the kingdom. It is, of course, clear, from the strictest constitutional point of view, that if the Convention Parliament, irregularly convened and thus being no legal Parliament, passed a statute conferring the Crown on someone, a Parliament subsequently convened by that person, thus irregularly become the wearer of the Crown, was equally irregular. The matter, however, is of no practical effect. It was a case of necessity, and, having been acquiesced in by the nation and recognized by statutes of many subsequent Parliaments, has become part of the constitution.

Subsequently the Act of Settlement (12 & 13 Will. III, c. 2) ordained that in default of issue of Mary, Anne, and William (which actually happened), the Crown should go to the Princess Sophia of Hanover and the heirs of her body being Protestants. The lineal succession by blood was thus continued.[1] As before stated, the succession of the Crown, even in relationship to the Dominions, depends upon English statutes, and cannot be affected by Dominion legislation.

In the strict language of lawyers, the term "demise" means the operation whereby, on the death of a person, his rights and property descend to his heir. The phrase "the demise of the Crown," however, is applied to the demise or death of the person who at the time wears the Crown, coupled with its transfer to his successor. "The death of the Sovereign in his

[1] Sophia was the daughter of Elizabeth, Queen of Bohemia, daughter of James I.

natural body is termed legally his *demise*, meaning the transfer of the kingdom (*demissio*) to his successor." [1]

Formerly the demise of the Crown had the effect of dissolving Parliament and vacating offices under the Crown, and it caused other inconveniences, although it was provided by a statute of Anne that if the King died when there was a Parliament, it was to continue in existence for six months, unless sooner dissolved by his successor, while, if there was no Parliament when the King died, the last Parliament was to come together and again be a Parliament. This has, however, been repealed, and now, on the demise of the Crown, the duration of an existing Parliament is no longer affected, the same principle being, apparently, applicable to the Privy Council and its membership.[2]

Blackstone has described the King as "not only the chief, but the sole magistrate of the nation." In regard to foreign affairs he is said to be "a permanent civil servant, with opportunities for acquiring a knowledge of things, and more particularly of men, such as no civil servant ever has or can acquire." [3]

Although the King cannot make laws at his pleasure, yet he has powers in regard to administrative matters which may be exercised without consulting Parliament. In the words of Bagehot, "not to mention other things, he could disband the army (by law he cannot engage more than a certain number of men, but he is not obliged to engage any men), he could dismiss all the officers, from the General Commanding-in-Chief [now the Chief of the Imperial General Staff] downwards; he could dismiss all the sailors, too; he could sell off all our ships of war and all our naval stores; he could make a peace

[1] Halsbury, *ubi sup.*, vol. vi, sec. 549, p. 375, quoting Blackstone, *Com.*, vol. i, 14th ed., 249.

[2] 6 Anne, c. 41, sec. 4 (1707); 30 & 31 Vict., c. 102, sec. 51; 1 Edw. VII, c. 5, sec. 1.

[3] Marriott, *ubi sup.*, p. 95.

by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. He could make every citizen in the United Kingdom, male or female, a peer; he could make every parish in the United Kingdom a 'university'; he could dismiss most of the civil servants; he could pardon all offenders." There is, however, as Bagehot points out, no fear that the Sovereign will do these things, or any approach to them, because there are two checks, "one ancient and coarse, the other modern and delicate." Any Minister who advised the Crown so to use its prerogative as to endanger the safety of the realm might be impeached for high treason, "and would be so." The other remedy against misuses of the prerogative is a change of Ministry.[1] Although the foregoing powers are rarely exercised, if ever, they exist in theory. They are only mentioned to illustrate the possible extent to which the Crown may stretch its prerogative. More real, though also rarely exercised, are the political powers which may be used. The King may appeal from Parliament to the electors, though risking an adverse verdict, by dissolving Parliament. He may also appeal to Parliament against the Ministry, by refusing a dissolution of Parliament to a retiring Ministry. On the other hand, the King may refuse to accept the resignation of a Ministry, but in that event the King will either take its advice, or the Ministry must conform to the wishes of the King. Theoretically, also, the King has a personal choice as to who shall be Prime Minister, but, in fact, the Sovereign's right to choose a Premier is very limited, for the Crown can choose only one of the few great leaders of the party which commands the confidence of the Commons. To this there has been one notable exception, in January 1924, when the Conservative Government resigned office, and the Sovereign was advised to invite Mr. Ramsay

[1] Bagehot, popular ed., pp. 36–8.

MacDonald, the leader of the Labour Party, which did not command a majority in the House, to form a Cabinet. The Crown, also, has certain informal rights in relation to the Ministers—in Bagehot's words, "the right to be consulted, the right to encourage, the right to warn." Though the Ministers must be responsible for all executive acts to Parliament, yet the "personal equation" of the Sovereign may count for much—as instanced by Queen Victoria's attitude towards the dispute with the United States over the Slidell and Mason affair, and the intervention of King George V in July 1914 with regard to the *impasse* between the Government and the Opposition over Home Rule, when a conference, which, however, proved unsuccessful, was invited by His Majesty to meet at Buckingham Palace. An instance where it was intimated on behalf of the Sovereign that his extraordinary powers under the Royal prerogative would be used, though they were not in fact exercised, arose with regard to the passing of the Parliament Act in 1911, when the resistance of the House of Lords to the Bill was overcome by the announcement that the Crown would, if necessary, assent to Mr. Asquith's demand that enough new peers should be created to vote down the opposition of the Upper House to the measure.

The late Mr. A. V. Dicey (*Law of the Constitution*, 8th ed., p. 52) was of the opinion that the passing of the Parliament Act, 1911, greatly restrained, if it did not abolish, the use of the Royal prerogative to create peers for the purpose of "swamping the House of Lords"—a threat which had also been made in the reign of William IV to overcome the resistance of the Lords to the Reform Bill (1832). Under the Parliament Act a Bill passed by the Commons may, under certain conditions hereafter mentioned, and after the lapse of two years and one month, become law without the assent of the Lords. So that if the

Crown be in future advised by Ministers to create new peers to overcome the opposition of the Lords, it will be sufficient to answer that a Bill will in time become law without their consent.

It is not proposed to deal in great detail with the rights, powers, and privileges which the Sovereign enjoys by virtue of the Royal prerogative. It is sufficient to characterize it generally, and to deal with one or two matters of detail which call for particular notice. Originally, as we have seen, the King was more or less absolute, that is, unrestrained in the exercise of his powers; and the prerogative is a survival of those absolute powers, or, as it has been defined by Dicey, it is "the residue of discretionary or arbitrary power which at any time is legally left in the hands of the Crown." This definition was adopted in the well-known case of *Attorney-General* v. *De Keyser's Royal Hotel Co.*, in which the Crown had taken possession of an hotel for War Office purposes during the War under the Defence of the Realm Act, 1914, in face of the protest of the receiver and manager for the debenture-holders in the hotel company. A petition of right was presented claiming a rent for use and occupation of the hotel. On appeal to the House of Lords, it was held that the suppliants were not entitled to rent, as there was no consent on which to found an implied contract; but that the regulations under the Act of 1914 gave no general power to take the land, but merely authorized a taking under the Defence Act, 1842, which provided for payment of compensation; that the Crown could not take under its prerogative, and that the suppliants could, if they chose, claim compensation under the Act of 1842. It was further held that, when a statute was passed empowering the Crown to do a certain thing, which it might previously have done by virtue of its prerogative, the statute abridged the Royal prerogative while it (the statute) was in force "to this

extent, that the Crown can only do that particular thing under and in accordance with the statutory provisions, and that its prerogative to do that thing is in abeyance." [1]

The House of Lords adopted the following statement by Swinfen Eady, M.R., in the Court of Appeal: "Those powers which the Executive exercises without parliamentary authority are comprised under the comprehensive term of prerogative. Where, however, Parliament has intervened, and has provided for powers previously within the prerogative being exercised in a particular manner, then, subject to the limitations and provisos, they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could disregard them at its pleasure?"

The various incidents and divisions of the prerogative have been classified by numerous writers on constitutional law. Any such classification is more or less arbitrary. Perhaps a convenient one is that which analyses the prerogative according to: (1) attributes of the Sovereign considered in his character as the head of the State; (2) personal privileges and benefits enjoyed by the Sovereign; (3) executive powers of the Sovereign.

Number (1) includes the familiar principles that the King is the sovereign head of the realm; that the King never dies; and that the King is never an infant, i.e. the law holds that the King is always capable of transacting business. The principle that the King can do no wrong is more properly referable to head No. (3), as it relates to the King's responsibility for executive and administrative acts done in his name.

Number (2) includes a number of rights of revenue which in olden times were the appanage of the King in his personal capacity. All these revenues are now, however, paid into the Consolidated Fund, and have, together with other Royal

[1] (1920) A.C. 508.

revenues, been commuted for the King's annual civil list, which means the income granted for the personal expenses of the monarch. This amount has been fixed during the present and the preceding reigns at £470,000 per annum, of which £110,000 is assigned for their Majesties' privy purse, and the remainder is applicable to the salaries and expenses connected with the Royal household, and other matters. The ancient privileged sources of Royal revenue were Royal fish, wrecks, treasure-trove, waifs and estrays, feudal dues, and escheats. The rents from the demesne lands of the Crown are now, also, paid into the public revenue.[1] The private estates of the Crown, paid for by the King and his ancestors out of the privy purse or other private means, are, of course, the private property of the Sovereign.

Number (3) includes the rights and functions exercised by the King in his official capacity as executive head of the State. The principal rights and functions are: (*a*) The sole power of sending ambassadors to foreign States, and of receiving ambassadors. The contemplated right of the Dominions to send or receive Ambassadors or Ministers Plenipotentiary will, strictly, be no infraction of the prerogative, for they will be sent in the name of the King as Sovereign of the Dominion concerned. (*b*) The right of making treaties and alliances with foreign Powers. It is also conceded that this right, as far as treaties are concerned, appertains to the Dominions (see Part I, Chapter II). Here, again, a treaty will be made by a Dominion in the King's name, and the position, constitutionally, will be the same as in the case of a treaty made by Great

[1] To use the language of Maitland (*Const. Hist.* 94), in early times, "no distinction was drawn between national revenue and royal revenue; the king's revenue was the king's revenue, no matter the source whence it came; it was his to spend, as pleased him best; always his pocket-money; it is to later times that we must look to any machinery for compelling the king to spend his money upon national objects."

Britain in the King's name. It does not appear, however, that a Dominion may enter into an alliance (even though concluded by treaty), as distinguished from an ordinary treaty, for such an alliance may bring the King's subjects in the Dominion into conflict with their allegiance to the King as Sovereign of Great Britain and all the Dominions beyond the seas. (*c*) The right of making war and peace. This right, as appears from the terms of the Covenant of the League of Nations, and as a consequence of Dominion status, also appears to appertain to the King as Sovereign of a Dominion, though it clearly cannot be exercised so as to bring the Sovereign as head of one part of the British Commonwealth into conflict with himself as head of another part. (*d*) The right to issue letters of marque and reprisal. This, which amounts to the right to legalize privateering, was abolished by international convention under the treaty of Paris, 1856. (*e*) The right of granting safe conducts. This, although it cannot be said to be wholly obsolete, is of very limited application in time of war only, being an exception to the ordinary rule of non-intercourse between belligerents. In times of peace, passports are granted to a citizen to travel to foreign countries. Though granted in the name of the Sovereign, they are issued by the Foreign Office in England, or by diplomatic agents abroad. They are of no effect in time of war in the country to which they are issued. (*f*) The power of rejecting Bills passed by Parliament. As regards Great Britain, this power has not been exercised since the reign of Anne. In the Dominions and colonies, as we have seen, certain legislative measures must or may be reserved for the signification of His Majesty's pleasure; and there have been several occasions on which the proposed measure has not been acceded to. Reference has been made to the new position which has been created in regard to the reservation of, and veto on,

Bills (see Part I, Chapter II). (*g*) The power of appointing ports and havens. These matters now form the subject of ordinary legislation (whether by Public Acts or by Private Acts of Parliament). (*h*) The power of prohibiting the importation or the exportation of arms and munitions of war. This is also, largely, a matter of ordinary legislation by Parliament, although the King may, at any time, by Order in Council prohibit importation or exportation of war materials, this power being exercised, usually, in terms of an enabling Act of Parliament, such as the Exportation of Arms Act, 1900, or the Customs (Prohibition of Exportation) Act, 1914. The King, however, has at all times the power to issue an Order in Council or Proclamation for these purposes, which may, in International Law, be obligatory upon him in order to preserve neutrality, apart from warlike measures. (*i*) The King is the fountain of justice, and the conservator of the peace of the realm. The entire administration of justice, civil and criminal, is in the King's name, and all judges and judicial officers, as well as all executive officers who carry out the decrees of the Courts of Justice, discharge their duties and perform their functions in the name and on behalf of the King. The preservation of the peace, also, is a duty carried out by the King's officers in his name; and it is the duty of every private citizen to aid and assist in maintaining it. It is "the King's peace." (*j*) The King is *parens patriæ*, the upper guardian of infants, idiots, and lunatics. His powers with regard to infants are exercised nominally by the Lord Chancellor and effectively by the Chancery Division of the High Court, of which the Lord Chancellor is President. By statute, certain powers, such as the right to grant leave to infants to marry in case of the unreasonable refusal of parents or guardians to give their consent, are exercised by magistrates; and other

statutory powers are conferred upon magistrates and other persons by such measures as the Children's Protection Acts. The Lord Chancellor has also a nominal superintendence with regard to idiots and lunatics, but the control of matters affecting them is confided to the Master in Lunacy and Visitors in Lunacy, and to the Board of Control under the Lunacy and Mental Deficiency Acts. (*k*) The King is the fountain of honour. This means that the sole right of conferring all titles of honour, dignities, and precedence resides in the Sovereign, who may confer any title or precedence upon such of his subjects as he pleases, and may create any new title or dignity. As to peerages which have fallen into abeyance, also, the King can terminate the abeyance by nomination of a coheir. (*l*) The Crown has the right to erect and dispose of offices —partly as the fountain of honour, by creating peers; and otherwise by the creation of corporations—a power now rarely exercised, for corporations are now incorporated under various Acts of Parliament. The King also appoints and dismisses Ministers and Government officials; and all commissions of officers in the Navy, Army, Air Force, and Civil Service are granted or cancelled by him. The King himself signs many appointments, as well as Orders in Council and documents under the Great Seal or the Royal Sign Manual. (*m*) The sole right of pardoning offenders, whether before or after conviction. This is usually exercised, in England, on the advice of the Home Secretary. In each colony it is delegated to a Governor-General or a Governor, being mentioned in his Instructions. The Crown, however, in terms of the Act of Settlement, may not shield its Ministers and servants from inquiry into illegal acts by means of pardons, no pardon under the Great Seal being pleadable to an impeachment by the House of Commons. (*n*) The King is supreme head and gover-

nor of the Church of England, nominating to all archbishoprics and bishoprics upon a vacancy, presenting to all benefices by lapse, convening and proroguing the ecclesiastical synods or convocations of Canterbury and York, having the nominal right to first-fruits of spiritual preferment (the proceeds, rated by statutory valuation, being payable to the Governors of Queen Anne's Bounty for the augmentation of poor livings), and the Crown further is the ultimate court of appeal in ecclesiastical suits—this appellate jurisdiction, as previously stated, being exercised by the Judicial Committee. (*o*) The Crown is vested with the property in all gaols and prisons. The Prison Commissioners and the Inspectors of Reformatories and Industrial Schools are departments of the Home Office. (*p*) At common law, the Crown has the exclusive power of making and issuing coins as a legal medium of exchange. These powers are now largely regulated by statute. Ordinarily, no coins or tokens for money may be issued except by the Royal Mint. In certain of the Dominions (e.g. Canada, Australia, and South Africa), coins may be made and issued in the King's name by a local Mint. The Crown has the exclusive right to fix the dimensions, designs, denominations, and standards of weight and fineness of the various current coins. This right is exercised, under the Coinage Act, 1870, subject to the advice of the Privy Council. The Crown may call in light coin; and may also legitimate, or make current, foreign coins by proclamation—a right never exercised in the United Kingdom, though it has been exercised frequently in oversea possessions where there is a native currency of foreign origin already in existence, e.g. rupees and dollars. (*q*) At common law the Crown had the right of regulating weights and measures, but this has been exercised by Parliament from very early times. (*r*) By virtue of the maxim that "the King can do

no wrong," the Crown is not responsible for the acts of its Ministers, though Ministers are responsible for all Royal acts. No individual acting in the name of the Crown can plead the Royal order as a justification for an illegal act. In order, however, to afford the subject a measure of relief for losses sustained by him through breaches of contract entered into with him on behalf of the Crown, a remedy, known as petition of right (now regulated by the Petition of Right Act, 1860), was introduced, whereby a subject may recover lands, goods, or moneys which have found their way into the possession of the Crown, and either restitution or compensation may be awarded him. This procedure is also applicable to the recovery of moneys due under a contract with the Crown, to recover damages for breach of a contract by the Crown, and for moneys payable to the applicant under a grant of the Crown. The King is not responsible for wrongful or tortious acts, but all Ministers and servants of the Crown, and public officers in general, are civilly and criminally liable, *as individuals*, for wrongful or criminal acts. On the other hand, no action is, as a general rule, maintainable against officers and servants of the Crown *in their official capacity*, either on contracts or torts (wrongs). And servants of the Crown or public officers cannot be made personally liable on contracts entered into by them in their official capacity unless it appears that they intended to render themselves personally liable. In most of the self-governing colonies Acts have been passed providing for the bringing of actions by subjects against the Crown in respect of contracts entered into or wrongs committed on its behalf. Apart from the procedure known as petition by right, every subject has the right to petition the King for redress of grievances sustained at the hands of any judge or other official, and this right to petition cannot, under the Bill of Rights

(1688), be denied. (*s*) The common law maxim "*nullum tempus occurrit regi*" (no time runs against the King) formerly applied universally, so that the right of the Crown to institute a civil suit or a criminal prosecution might not be barred by lapse of time, and the Prescription Acts do not bind the Crown, unless it is expressly named. Various statutes have, however, introduced exceptions to this rule. (*t*) The sole right of summoning Parliament, which is done by the Royal writ, of terminating a session of Parliament by proroguing it, and of terminating the life of the House of Commons by dissolving Parliament. Parliament may adjourn its own sittings. In former times this was occasionally done upon the request of the Crown; but this practice was not followed in later years. Parliament, i.e. the House of Commons, may expire by effluxion of time, namely, the period of five years fixed for its duration by the Parliament Act, 1911. The Royal prerogative to dissolve Parliament at an earlier date is, by custom, exercised only upon the advice of the Cabinet, when it desires to test the feeling of the country upon its policy, which usually occurs when the House of Commons has failed to support the Ministry in passing an important or party measure, or when the House has passed a vote of want of confidence in the Government. In the latter event, the Ministry may either resign, without advising the Sovereign to dissolve Parliament, and make way for a new Ministry, or it may advise the Sovereign to dissolve Parliament and may then "go to the country." Parliament may also be dissolved when the Crown has reason to believe that the House itself, apart from or inclusive of the Ministry, no longer represents the wishes of the electorate. This may happen even if the Ministry still enjoys the confidence of the House of Commons, but the Crown believes that the wishes or the policy of the House is opposed to that of the electorate.

In the colonies the administrative prerogatives are exercised by the Governor or Governor-General in the King's name, in terms of the Commission, Letters Patent, or Instructions issued to him by or on behalf of the Crown. In a self-governing colony the Governor summons, prorogues, and dissolves Parliament, and he has similar powers with regard to the legislature of a non-self-governing colony. He exercises the prerogative of pardon. Statutes, in the case of Crown colonies, are enacted in the name of the Governor, acting with the advice and (where required) the consent of the legislature; in the case of Dominions, by the King and the Houses of the legislature. The administration of justice, including the issue of all civil process and criminal indictments and charges, is carried on directly in the name of the King. All public lands are designated as Crown lands, and Crown grants of land are made in the King's name. The coinage (except where, as previously stated, a local and originally foreign coinage has been adopted) and postage stamps are issued in the King's name, though in recent years, in the Dominions, the practice has at times been adopted of issuing stamps merely in the name of the Dominions and without the King's effigy. The moneys arising from Crown lands, like other sources of revenue in a colony, do not go to the British exchequer, but are paid into, and form part of, the public revenues of the colony.[1] So the Crown, by constitutional practice (whatever may have been the original law on the subject), has no prerogative right to fisheries, escheats, mines, or treasure-trove in the colonies, but the revenues from these sources are paid into the colonial treasury.[2]

[1] Under the Act 15 & 16 Vict., c. 39.

[2] *Mayor of Lyons* v. *East India Co.*, 1 Moo. Ind. App. 281.

CHAPTER II

PARLIAMENT

The principle that the British Parliament is the supreme authority in the British Empire embodies a statement not so much of law as of existing fact, which is the outcome of a long train of historic circumstances. In order to appreciate this we must know, in the first place, what Parliament is. It consists not merely in two Houses of legislature, the Lords and the Commons. The Sovereign is an equally essential part of Parliament, for his assent is necessary to any Bill passed by the two Houses before it can have the force of law; and legislation is not effective until it results in a law which has been finally passed.

Thus Parliament consists of the Sovereign, the House of Lords, and the House of Commons. The two Houses are sometimes spoken of as the three Estates of the Realm, and this phrase is sometimes mistakenly taken to include the Sovereign. The three Estates in fact consist of the two classes of peers, the Lords Spiritual and the Lords Temporal, who together constitute the House of Lords, and the House of Commons, consisting of the elected representatives of the people. "The three Estates are the clergy, barons, and commons, those who pray, those who fight, those who work; this seems to have been considered an exhaustive classification of the divers conditions of men." This is a statement of the origin of the three Estates in mediæval times.[1]

[1] Maitland, *Const. Hist.*, 75. For a comprehensive statement of the law and practice relating to Parliament, the reader should consult Halsbury, *Laws of*

There were times in English history when, as every reader is aware, the power of the Sovereign completely overshadowed that of the two Houses of the legislature; and during long intervals they were not even summoned to meet. There were other times when the legislature, or, rather, one branch of it, the Commons, was dominant. It is from the beginning of the eighteenth century that we must date the creation of an equipoise, or balance, between the Sovereign and the Houses of the legislature. This was largely secured by the necessity for holding annual sessions of the legislature. As far back as the reign of Edward III it was enacted that Parliament should be held annually, although this appears to have meant that there should be a newly elected Parliament every year.[1] This, as we have seen, was disregarded by rulers who conceived themselves strong enough to govern without a legislature. It was not until the reign of William III that it was resolved to make the vote of supplies by the Commons an annual one. The result of this was, and is, that Parliament must meet at least once a year in order to keep the machinery of the State in motion. All the ordinary charges of the army, navy, civil services, and revenue departments of the public service have ever since then been voted for a year only, and this has necessitated the regular annual summoning of Parliament. There are various statutes also, such as the Army Act, which require renewal annually. In this way the control of Parliament, meeting regularly, over the affairs of the kingdom was ensured—a control exercised not only by the power to enact laws and grant supplies, but by the right of members to inquire into every action of the administrative part of government. At the same time, "failing

England, vol. xxi, the article wherein on Parliament was prepared by or under the direct supervision of the late Lord Halsbury, Lord Chancellor.

[1] Stubbs, *Const. Hist.*, iii, 380.

a revolution, and statutory provision, no one but the King can call a Parliament." The summoning of Parliament depends on the will of the Crown.[1]

Another check upon the unfettered power of the Sovereign was created by the passing of a measure designed to set a limit upon the life of any one Parliament, in order to secure dependence of the elected representatives upon the will of the electorate, and prevent, as far as possible, any corrupting influence of the executive upon the members of the House of Commons. This was secured by the passing, in 1693, of the Triennial Act, limiting the life of Parliament to three years. It was, however, vetoed by William III, whereupon it was re-enacted in the following year, and then received the Royal assent. In 1716 the Septennial Act was passed, extending the duration of a Parliament, unless sooner dissolved, to seven years. This Act is considered to have resulted in "a marked increase in the stability and power of the House of Commons and a strengthening of the influence of the Ministry."[2] It continued in force until 1911, when it was amended by the Parliament Act, which is referred to later on. From another point of view the limitation of the life of a Parliament is a check on the power of the legislature itself, if it maintains the law; though there is nothing to prevent a Parliament from extending its own life—as happened in 1716.

In the constitutions of the Dominions it is expressly enacted that there shall be annual sessions of Parliament. The duration of life of the lower House (the Canadian House of Commons,

[1] See Halsbury, *ubi sup.*, vol. vi, 383; Hannis Taylor, vol. ii, 420–1. Maitland (*Const. Hist.*, 295–6) seems to be incorrect when he says: "It is the King's *statutory* duty to call a Parliament together at least once in every year." He correctly adds: "If he neglects to do this, there is no lawful manner in which a Parliament can come together."

[2] Taswell-Langmead, p. 613.

and the House of Assembly of the Union) is five years in Canada and South Africa respectively, while in Australia the life of the House of Representatives is limited to three years. Any such House may, however, be sooner dissolved by the Governor-General.

In spite of the constitutional checks which have been devised, it cannot be said, having regard to developments in recent years, that there is any power in the State which is absolutely supreme. There has been a tendency towards an accretion of power on the part of the Ministers, who not only control the whole of the executive government, but, in effect, control all the business of the legislature, if they do not monopolize it. This has been largely owing to the increasing demand of the details of public legislation, which reaches into so many departments, upon the time of the legislature. As far back as 1903 Professor A. L. Lowell wrote: "The programme of the Ministers must be accepted or rejected as a whole, and hence the power of initiative, both legislative and executive, must rest entirely with them. This is clearly the tendency of Parliament at the present day. The House of Commons is finding more difficulty in passing any effective vote, except a vote of censure. It tends to lose all powers except the power to criticize and the power to sentence to death" (*The Government of England*, i, 355). On the other hand, the legislature, or if not it, then the electorate, may terminate the life of the Ministry; and the ultimate dependence of the Ministry upon the electorate has been manifested, in recent years, in a remarkable way, the life of successive Ministries having been very short in comparison with the duration of Cabinets in past years.

It has been mentioned, also (see Part II, Chapter I, and Part I, Chapter II), that in the self-governing Dominions the

power of the British Parliament has decreased and the direct influence of the Crown has increased in proportion.

For considerably over a century there has been no occasion for any check upon the action of the Sovereign himself. In recent times, indeed, it is the moderating influence of the Sovereign that has been called for to prevent conflict between the two Houses of the legislature in England. The exercise of arbitrary power by the Crown is now sufficiently prevented by (1) the necessity for adherence to the ordinary law of the land—"upon any doubtful point of prerogative the Crown and its Ministers must bow to the decision of the legal tribunals"[1]; (2) the doctrine of ministerial responsibility to Parliament, not merely for all advice given by Ministers to the Crown, but for all acts of the executive, whether advised by or even known to the Ministers or not; (3) the civil and criminal liability of Ministers and servants of the Crown for tortious or criminal acts[2]; (4) the right of the subject to petition the King, secured by the Bill of Rights (1688); (5) the necessity for obtaining supplies annually from Parliament, without which the Government could not be carried on.

Differences between the two Houses of Parliament are, in the last resort, resolved by the electorate. "It is through a General Election that the authorities' means of settling a difference between the two Houses is now found. . . . The will of the nation finds its most absolute expression in the judgment of the House of Commons elected for the purpose of ascertaining its will upon some definite issue. . . . No one ever questions the guidance of a General Election. The force which it expresses is a constant subject of appeal as the ultimate power

[1] Halsbury, *ubi sup.*, vol. vi, sec. 567, p. 382.

[2] This is not a dead letter. In Canada and Newfoundland Ministers have been prosecuted for corruption.

of the State."[1] It should, however, be added, by way of reservation, that a General Election sometimes takes place upon no very definite issue; and the complaint is sometimes made that a Government has introduced and carried legislation without any mandate from, or even expression of will of, the electorate. It may be true that in such a case the Government will ultimately have to undergo the scrutiny, and submit to the will, of the electorate; but the legislation which it has passed, contrary to the opinion of the electors as subsequently expressed, may remain upon the statute-book.

In addition to the constitutional limitations upon the power of Parliament previously mentioned, there are certain indirect checks. One of these is the growing power of the Cabinet, which may appeal to the country, and thus terminate the political life of the members of the House of Commons. It has also been suggested, by Professor Vinogradoff, that the existence of the League of Nations, as a super-Parliament, to a certain extent sways the minds of members of either House of Parliament in Great Britain and impedes their free judgment. It is, however, extremely doubtful whether the League is a super-Parliament. It is not a super-State; and it certainly has no legislative authority over its constituent States. All that can be said is that in so far as Great Britain, along with the other constituent States, has confided certain powers to the League, it has fettered its own hands to a certain extent in foreign affairs, e.g. with regard to war-making, international disputes, and treaties. But this in no way derogates from the sovereignty of the British Parliament as the legislature of a free State. Another indirect check upon Parliament, which is at times effective, is the pressure of public opinion, mainly exercised through a free Press. The publicity of parliamentary proceed-

[1] Lord Courtney, *ubi sup.*, p. 5.

ings, and the opportunity for criticism thus afforded, are to a certain extent limitations upon the unlimited use of parliamentary powers.[1]

It has been suggested that the growth of political associations such as combinations of workmen and of employers, national and international, has been tolerated to such an extent as to tie the hands of Government and Parliament.[1] This, however, is very doubtful, as their action is uncertain and spasmodic, and these associations, even if their actions be violent, can only influence the legislature in the same way as any other combinations. They are assumed to keep within the law. If they do not, their actions cannot be described as constitutional. In any event, the constitution cannot recognize any indirect action on their part. If such action, being contrary to law, is successful, it is, in effect, revolutionary, and to that extent the constitution will either be displaced or disappear.

What is, however, clear is that there is no superior authority by which the legislature in Great Britain can be called to account.[2] This is not the case with a colonial legislature, excepting those of the Dominions. A colonial legislature may be called to account by the Imperial Parliament, which is done, in practice, by overriding its legislation. A sufficient safeguard is, however, provided by the power of veto exercisable by the Governor or by the Colonial Office acting on behalf of the Crown. Theoretically, also, the constitution of a colony may be revoked, and its legislative powers terminated. This cannot happen in the case of a Dominion.

Although the Imperial Parliament may pass, and frequently does pass, general legislation affecting the Empire as a whole, and in this sense may be said to be supreme, yet there are two limitations to this principle: (1) No legislation can affect a

[1] Chalmers and Asquith, pp. 21–4. [2] Marriott, *ubi sup.*, p. 18.

self-governing Dominion without its own consent; (2) in the case of other colonies which have received a constitution, no taxation can be imposed by the Imperial Parliament.[1] It has been suggested, with regard to the power of the Crown to legislate with regard to Crown colonies by Order in Council or otherwise, that this power may only be exercised if such power has been expressly retained by the Letters Patent, or other document, regulating the constitution; but it appears that the absence of such express power would not prevent the Crown from legislating by Order in Council or otherwise.[2]

There is a great mass of literature in regard to the growth of the control of the House of Commons over the public finances, including therein the sanctioning and checking of expenditure and the levying of taxation. It is sufficient to mention that at one time the House of Lords claimed, and even occasionally exercised, the right to interfere with the imposition of a tax by amending it. After the Restoration, however, the Commons began to contend that the Lords could make no alteration in a Money Bill, but must simply accept it, or simply reject it. The principle had previously been established that all Money Bills must originate in the House of Commons. Many years of controversy followed regarding the right of the House of Lords to interfere with Money Bills. It was resolved by the House of Commons, in 1860, that the right of granting aids and supplies to the Crown was in the Commons alone; that, although the Lords had sometimes exercised the power of rejecting Bills relating to taxation, yet the exercise of that power was regarded by the Commons with peculiar jealousy, as affecting their right to grant supplies and provide ways and means for the service of the year; and that, to secure to

[1] Egerton and Grant, *Canadian Const. Development*, p. 350.
[2] Halsbury, *ubi sup.*, vol. vi, p. 424.

the Commons their rightful control over taxation, that House had in its own hands the power so to impose and remit taxes, and to frame Bills of supply, "that the right of the Commons as to the matter, manner, measure, and time may be maintained inviolate." Since 1861 the practice has been followed of presenting the whole of the financial proposals for the year (except such as are merely additional or supplementary) in one Bill instead of in several measures, thus rendering it extremely difficult for the House of Lords to amend the financial arrangements agreed to by the Commons without rejecting the whole budget for the year.

On the other hand, it is a privilege claimed by the House of Lords that the House of Commons may not annex or "tack" on to a Bill of supply, or to impose or remit taxes, or for the appropriation of supply, any clause or clauses containing matter foreign to and different from the main object or matter of any such Bill. This practice of "tacking" appears to have originated in 1700, when the Commons inserted in a taxing measure provisions dealing with other matters, thus placing the Lords in the dilemma of either rejecting the measure or agreeing to the Bill with the added matters. The Lords, however, stood firm and rejected the Bill, "for, by this means, things of the last ill consequence to the nation may be brought into Money Bills; and yet neither the Lords, nor the Crown, be able to give their negative to them, without hazarding the public peace and security." [1] The practice of the House of Lords has invariably been to reject "tacking" measures. Now, as will be seen, the Speaker of the Commons, under the Parliament Act, certifies what are Money Bills.

In certain of the Dominion constitutions there are provisions designed to prevent "tacking." Thus, it is provided by the

[1] *Commons Journals*, 1700, vol. xiii, p. 321.

South Africa Act, 1909, that no Bill appropriating the revenues or moneys for the annual services of the Government shall deal with any other matter. And the Australian Commonwealth Act, 1900, forbids the mixing up of other matters in taxing Bills, and requires that customs and excise taxation shall each be dealt with in separate Bills, while other taxation Bills must be confined each to a single subject.

The right of rejection by the House of Lords over Bills dealing with supplies, or levying or remitting a tax or charge upon the people, and its right to postpone any such Bill, is still in existence in theory, but, in terms of the Parliament Act, 1911, a Bill certified by the Speaker as a Money Bill may now become law notwithstanding its rejection or postponement by the Lords. It accordingly becomes necessary to consider, briefly, the terms of that Act. Its passing revolutionized the relations between the two Houses, and the agitation which it created before it was passed constituted, in effect, a miniature revolution.

The following is a summary of the provisions of the Parliament Act, 1911:—

(1) If a Money Bill is sent up to the House of Lords at least one month before the end of the session, and is not passed by the House of Lords without amendment within one month after it is so sent up, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified, notwithstanding that the House of Lords have not consented to the Bill. A Money Bill means a Public Bill, which in the opinion of the Speaker of the House of Commons contains only provisions dealing with all or any of the following subjects—the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt

or other financial purposes of charges on the Consolidated Fund, or on money provided by Parliament, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or its repayment; or subordinate matters incidental to those subjects or any of them. The expressions "taxation," "public money," and "loan" do not include any taxation, money or loan raised by local authorities. There shall be endorsed on every Money Bill, when it is sent up to the House of Lords and when it is presented to His Majesty for assent, the certificate of the Speaker, signed by him, that it is a Money Bill (sec. 1).

The effect of this provision is to deprive the House of Lords of its power to amend or reject Money Bills. It may do so formally, but the Bill becomes law without its being passed by the Lords. In other words, all legislative power in respect of such Bills is taken away from the House of Lords.

(2) If any Public Bill (other than a Money Bill or a Bill containing a provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by it in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal assent being signified thereto, notwithstanding that the House of Lords has not consented to the Bill—but this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons, and the date on which it passes

the House of Commons in the third of those sessions. When a Bill is presented for the Royal assent in pursuance of this provision, there shall be endorsed on it the certificate of the Speaker, signed by him, that the provisions of this section have been duly complied with. A Bill shall be deemed to be rejected by the House of Lords if it is not passed by it either without amendment or with such amendments only as may be agreed to by both Houses. The House of Commons may in the passage of such a Bill through the House in the second or third sessions suggest amendments, without inserting them in the Bill. If these amendments are agreed to by the House of Lords, they shall be treated as amendments made by the Lords and agreed to by the Commons (sec. 2).

The effect of this provision is to restrict the Lords to a "suspensive veto" in respect of Bills (other than Money Bills or Bills to prolong the duration of Parliament) which may be passed by the House of Commons in three successive sessions during the first two years of Parliament. This suspension veto, says Dicey, is secured to the Lords because no such Bill can be passed without its consent unless the four following conditions are fulfilled: (1) The Bill, before presentation to the King for his assent, must be passed by the Commons and rejected by the Lords in each of three *successive* sessions; (2) The Bill must be sent up to the Lords at least one calendar month before the end of each of these sessions; (3) In respect of such Bill, at least two years must have elapsed between the date of the second reading of the Bill in the House of Commons during the first of those sessions and the date on which it passes the House of Commons in the third of such sessions; (4) The Bill presented to the King for his assent must be in every material respect identical with the Bill sent up to the Lords in the first of the three successive sessions, except in

so far as it may have been amended by or with the consent of the Lords.[1]

A secondary consequence of this provision, according to Mr. H. A. L. Fisher, is to enable the country to pronounce more rapidly upon the action of a Ministry so passing statutes in defiance of the opposition of the Second Chamber.[2]

The Parliament Act was brought into operation on the passing of the Government of Ireland Act, 1914. This measure was twice rejected by the Lords, and in September 1914 received the Royal assent without the consent of the Lords. By that date, however, it had become apparent that the Act, which was in substance identical with the original Bill introduced in 1912, required amendment in respect of Ulster. A suspensory Act was accordingly passed, whereby the Government of Ireland Act, 1914, was not to come into force for twelve months. "The Suspensory Act," says Mr. Dicey, "evades or avoids the effect of the Parliament Act, but such escape from the effect of a recently passed statute suggests the necessity for some amendment in the procedure created by the Parliament Act." In the event the Government of Ireland Act, 1914, became a dead letter.

The general effect of section 2 of the Parliament Act is that a majority in the Commons may pass any Bill, and, without the consent of the Lords, present it to the King for his assent, provided it has complied with the foregoing conditions. The Act does not touch the Royal veto, though that, as previously stated, has not been exercised for over two centuries; nor does it otherwise interfere with the Royal prerogative.

(3) A certificate given by the Speaker under this Act is conclusive for all purposes and may not be questioned in any court of law (sec. 3).

[1] *Ubi sup.*, p. xxi. [2] Note to Maitland (*Const. Hist.*), p. 540–1.

(4) Nothing in the Act is to diminish or qualify the existing rights and privileges of the House of Commons (sec. 6).

(5) Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715 (sec. 7).

The effect of this section is that the life of a particular Parliament is limited to five years, i.e. the period for which the members elected to the House of Commons may sit. After the expiry of that period, assuming there has been no prior dissolution, there must in any event be a fresh general election. This provision does not affect the House of Lords, whose members, under the existing principles of the constitution, remain members notwithstanding any dissolution of the House of Commons. The dissolution of the Parliament thus really means the dissolution of the House of Commons.

The question has been raised whether the Parliament Act has transferred legislative authority from the King and the two Houses of Parliament to the King and the House of Commons. Mr. Dicey holds that "the better opinion on the whole is that sovereignty still resides in the King and the two Houses of Parliament," on the grounds that the King and the two Houses acting together can most certainly enact or repeal any law whatever without contravening the Parliament Act, and that the Lords, while they cannot prevent the Commons from changing the constitution as long as the conditions of that Act are observed, may nevertheless, while that Act is in force, prohibit the passing of any Act the effectiveness of which depends upon its being passed without delay.[1] In other words, the House of Lords may delay a Bill for three sessions, with the result that, where the matter is deemed to be urgent or has to deal with a pressing necessity at the time of the original

[1] *Ubi sup.*, p. xxiv.

introduction of the Bill, the measure is rendered abortive. This delaying power of the Lords is thus still of considerable effect. At the same time it cannot be denied that the effect of the Parliament Act has been to reduce the House of Lords to a secondary place in the sphere of legislation. On the other hand, that House is still a part of the constitutional machine. There have been several proposals for the "reform," which really means the reconstitution, of the House of Lords, but nothing has yet been done in the matter. Such an alteration would really entail the framing of a written constitution.

It must be remembered that the constitution of the House of Commons has itself undergone alteration from time to time; and has, in effect, been "reformed," so that the membership, the constituencies, and the voting qualifications at elections of members have been greatly altered in comparison with what they were in early times. This has been accomplished directly, by statutory provision for the distribution and redistribution of constituencies or parliamentary seats, including the abolition of constituencies which, by reason of their unimportance or the small number of their electors, no longer had any right to representation; and by an alteration in the number of members. Indirectly, it has been done by successive alterations in the franchise qualifications. These matters are now dealt with by the Representation of the People Act, 1918.

Under this Act the principle of "single-member constituencies" has been adopted, with certain exceptions, the representation in Great Britain in 1923 being about one member to every 70,000 of the population, and the number of members was fixed at 707, since modified owing to the constitutional alterations with reference to Ireland. It is now 615.

The franchise, under the Act of 1918, depends upon the following qualifications: Men must be twenty-one years of

age, and may be entitled to vote by residence only, for the qualifying period of six months, in any one constituency or in any contiguous constituency or county; or by the occupation, for the same period, of land or premises for business purposes of the annual value of £10. A man of full age who has received a degree at any university forming, or part of, a constituency, is entitled to be registered as a voter for that constituency. Honorary degrees do not qualify. Women may vote, provided they are thirty years of age. In the case of a woman she must be qualified by registration as a Local Government elector for the occupation of land or premises of the yearly value of £5, or of a dwelling-house, or in that she is the wife of a husband who is entitled to be so registered. A woman is entitled to be registered as a parliamentary voter for a university constituency if she is thirty years of age and has been admitted to a degree, or has passed the final examination and followed the conditions required of a woman by a university which at the time the examination was passed did not admit women to degrees. Except in respect of age, the voting qualification for women is less stringent than in the case of men. In 1927 it was announced that the Government proposed to introduce legislation lowering the age for the franchise for women to twenty-one, as in the case of men. It will be seen, in any case, that the property qualification, in the case of both men and women, is exceedingly low; and the only way in which the franchise can be broadened, apart from extending it to minors, is to abolish the property qualification altogether.

Another reform of importance, with regard to the House of Commons, was the passing of the Parliamentary Elections Act, 1868, whereby the trial of disputed elections was transferred to judges of the Supreme Court. Previously the House

itself had been the judge of disputed elections, and this system frequently led to abuse. The House of Commons, however, still retains the right to decide upon the qualifications of any of its members to sit and vote in Parliament; and it may by resolution expel a member, though, if the cause of his expulsion does not in itself constitute a disqualification to sit and vote, his constituency may re-elect him.[1]

Although, as we have seen, the House of Lords no longer enjoys legislative power co-extensive with that of the House of Commons, it discharges, or may be called upon to discharge, certain other functions of importance. In the first place, it is the final Court of Appeal for Great Britain. This function theoretically resided in the House as a whole. But, by the Appellate Jurisdiction Act, 1876 (as amended in 1887), the House of Lords, for the discharge of its functions as a court of appeal, consists of the Lord Chancellor of Great Britain, the four Lords of Appeal in Ordinary, and peers of Parliament who hold, or have held, certain defined judicial offices. The House of Lords, as a whole, has also original jurisdiction upon the impeachment of any individual by the House of Commons. Any peer or peeress charged with felony or treason has the right to be tried by the House of Lords if Parliament be sitting, or, if it is not sitting, by the Court of the Lord High Steward, at which any peer of Parliament is entitled to attend.[2] A peer or peeress may not claim this mode of trial on a charge of misdemeanour, for which he or she is tried in the same way as a commoner. In civil suits the House of Lords exercises no original jurisdiction.[3]

Much of the practice and legislation in regard to parlia-

[1] Halsbury, *ubi sup.*, vol. xxi, p. 787, sec. 1479.

[2] Maitland, pp. 245–6; Halsbury, vol. xxi, p. 653, sec. 1162.

[3] No claim to this jurisdiction has been made since *Skinner* v. *East India Co.* (Maitland, p. 148).

mentary procedure, and the privileges of members, has been adopted in the colonies which possess parliamentary institutions. Most of the practice and principle relating to parliamentary privilege in England is, however, contained in resolutions and precedents, whereas, in the Dominions, special statutes have been enacted dealing with the powers and privileges of Parliament. The procedure initiated by the English Parliamentary Elections Act, 1868, has also been adopted by statute, with various modifications, in the Dominions, and so have the provisions of the statutes relating to corrupt practices. With regard to the trial of election petitions, the general principle which has been followed, in conformity with the precedent set by the English Act, is that there is no appeal from the decision of the judges who hear an election petition. In South Africa, however, an appeal lies from the decision of such judges to the Appellate Court of the Union.

CHAPTER III

EXECUTIVE GOVERNMENT

Although the King is the supreme executive head of the nation, the conduct of general executive business, as well as the superintendence and control of the executive branches of government and of the various departments of public administration, is in the Cabinet—for it would be manifestly impossible for the King, even in an absolute monarchy, to superintend all the details of government. The ramifications of the modern system are so numerous and far-reaching that even a Cabinet finds it difficult to examine into the execution of all the *minutiæ* of public business; and there has been an increasing tendency of recent years for a Cabinet to become, in the main, a superintending or supervisory body. Nevertheless, the members of the Cabinet are responsible to Parliament, any and every member of which is entitled to ask questions regarding the least subject of administration. For the answers to such questions Ministers have to rely upon the heads of departments, to whom also, as a rule, there is left the practical responsibility for departmental business. The result has been a considerable growth in the powers of the civil service as a whole, and critics have not been wanting to point out the evils of a bureaucratic system. Such a system, however, appears to be inseparable from the ever-extending scope of modern government.

This increase in the work of government has led to a growth in the numbers, not merely of the permanent servants of the State, but also of the Ministers who are charged with general

superintendence of departments and answerability to Parliament. In early times, when there was no Ministry, and the King governed directly through his servants, the number even of such servants was limited. In the fourteenth century it was possible for Geoffrey Chaucer to hold his office of controller of the customs at the same time as he was an envoy of the King to foreign States, and to be charged subsequently with the superintendence of public works and the conservancy of the Thames.

Originally, the sole Ministers of the King were the Treasurer or Chancellor of the Exchequer and the Keeper of the King's Seal, subsequently Lord Chancellor. The exchequer was originally administered by a council of the great men of the realm, who at first attended in person, but subsequently, from the reign of Henry II, by deputy. The superintendence of the department, which naturally, administering as it did the finances of the realm, grew to great importance, was in the hands of the Lord Treasurer. The Chancellor also ceased to attend in the reign of Henry III, and his clerk acquired the title of Chancellor of the Exchequer. The Chancellor himself was at first an ecclesiastic, and then became "the keeper of the King's conscience." In secular matters he was the secretary of the King, whose Royal seal was kept by him and affixed to writs and warrants. With his staff, originally consisting of chaplains, he conducted all the secretarial work and correspondence of the Royal household. In fact, he was a sort of secretary of State for all departments.[1] As all petitions passed through his hands, he came to discharge judicial functions, and these, depending largely upon his discretion, resulted in the growth of an equity system, as distinguished from the more rigid common law, which was administered by the Court of

[1] Stubbs, *Const. Hist.*, i, 384–97; Gneist, *Const. Hist.*, p. 219.

King's Bench, and also by the Common Pleas and (in financial matters) by the Court of Exchequer. Ultimately, the judicial business of the Chancellor grew to such an extent that special secretaries had to be employed for various departments. One of these was the secretary to the King's Council (subsequently known as the Privy Council).

In the reign of Elizabeth there were at one time two joint secretaries of State, but subsequently, in the same reign, their functions were combined in one person, that of Walsingham. He was, however, not a Minister, in the same sense as a modern Secretary of State, having no responsibility to Parliament, but was, in fact, a sort of permanent under-secretary (in the modern sense) of the home and foreign departments, having an assistant secretary under him. The real Minister, though also not responsible to Parliament, was the Lord President of the Council. The Keeper of the Seals, after the Chancellor's business grew, was a separate officer, though it was enacted in the reign of Elizabeth that the Lord Keeper, who was usually, though not necessarily, a peer, holding office during the pleasure of the Crown, should be entitled to "like place, pre-eminence, jurisdiction, execution of laws, and all other customs, commodities, and advantages" as the Lord Chancellor.[1] In the following reigns the Lord Keeper was usually raised to the position of Lord Chancellor, retaining the custody of the Great Seal. The first holder of the office of Lord High Chancellor of Great Britain (as from May 1, 1707) was Lord Cowper (appointed in 1705); and since then the office has generally been exercised in that name, though the last officer actually designated as Lord Keeper was Sir Robert Henley (afterwards Lord Northington), who was made Chancellor in 1760. The holder of the office of Lord High Chancellor is thus also

[1] 5 Eliz., c. 18 (1562).

Keeper of the Great Seal. He is appointed Chancellor by letters patent, but becomes Keeper by mere delivery to him of the Seal. As Keeper of the King's conscience the Lord Chancellor nominates to all Crown livings. While the Lord Chancellor is head of the judiciary and Speaker of the House of Lords, his office is also a political one, and he is invariably a member of the Cabinet, discharging, in part, the functions of a Minister of Justice, by appointing judges of the High Court, judges of County Courts, and justices of the peace—but not the Lords Justices of Appeal, Law Lords, or Stipendiary Magistrates —the other functions of a Minister of Justice being performed by the Attorney-General and the Solicitor-General, and by the Lord Advocate in Scotland. The Lord Chancellor thus vacates office with the Ministry. He takes part in debates in the House of Lords as a member of the Government, and sometimes acts as leader of the Government party in the Lords—though, while so debating, he does not sit on the woolsack. In former times holders of the office of Lord Chief Justice, such as Lord Mansfield, were sometimes members of the Ministry, and the Master of the Rolls had a seat in the House of Commons. From the time of Lord Ellenborough, in the beginning of the nineteenth century, however, no Lord Chief Justice has sat in the Cabinet, and since 1873 the Master of the Rolls, like all the other judges, has not been eligible to a seat in the House of Commons.[1]

In the reign of Charles II the administration of the affairs of the kingdom was in the hands of ten or twelve great officers of State. Of these, five, constituting a committee of the Privy Council, who were known as the "Cabal," were concerned with foreign business, and were designated as the "Committee

[1] The last Master of the Rolls to sit in the Commons was Sir John Romilly (d. 1852).

for Foreign Affairs." This committee was the germ of the modern Cabinet, though the name was first employed in 1640, when Charles I had a small council of peers, of whom Clarendon says: "These persons made up the committee of State, which was reproachfully after called the *Juncto*, and enviously then in Court the *Cabinet Council*." It was in the reign of William III (1693) that the modern principles of constitutional government originated—that the Executive Government should be carried on by a Ministry consisting of statesmen holding the same political principles and identified with each other; and that the Ministry must command and retain the majority of votes in Parliament. The second of these principles was departed from in 1924, when, owing to the inability or refusal of the other parties to form an administration, Mr. Ramsay MacDonald, though leading a minority party, undertook the task of forming one. At first, and practically throughout the eighteenth century, the Cabinet was small in numbers, and, in fact, most of the control was in the hands of the leader of the Government, who was subsequently known as Prime Minister or Premier. It was only in course of time, and as the result of administrative and parliamentary experience, that each member of the Cabinet became definitely responsible for the affairs of his department, though the Cabinet as a whole shared in the general responsibility for the policy of the political party which they represented. It was now, also, that politicians definitely ranged themselves on one side or another, and the party system has ultimately come to be regarded as inseparable from parliamentary government. The phrase, "His Majesty's Opposition," to designate the leading minority party, was first used by Lord Brougham. Since the reign of George V official precedence has been accorded to "the Leader of His Majesty's Opposition."

The Cabinet, though it has long displaced the Privy Council as the executive authority in the State, and thus occupies a place of the greatest importance in the unwritten constitution, is still unknown to the law in England.[1] It is nowhere mentioned in any Act of Parliament. In this it contrasts with the position of similar bodies in the Dominions, whose position as "Ministers," or "Executive Councillors," is recognized in the constitution Acts. And neither in the Petition of Right (1628) nor in the Bill of Rights (1689) is there any direct reference to the responsibility of the King's Ministers to Parliament. "The silence of these great documents on a question of the first constitutional significance is exceedingly characteristic of the Revolution settlement, and indeed, more generally, of English constitutional development. Not even in 1689 was there any attempt to codify or even to reduce to writing the leading principles of the constitution."[2] Nevertheless, the power of the Ministers is an effective one, and practically the entire conduct of public affairs, and with it the responsibility, resides in them. "The will of the Crown is now the will of the Minister, and the Minister is a person possessing" —or, it may be added, assumed to possess—"the confidence of the House of Commons, which represents the will of the nation. . . . If on rare occasions of transcendent importance the Crown sets aside the will of the Minister, this step is defensible only on the assumption that the Minister no longer represents the national will, and it cannot be taken unless another Minister is found ready to accept the responsibility of a different advice. It does not follow that the personal influence of the Sovereign is entirely lost in the working of the organization of the State."[3]

[1] Chalmers and Asquith, p. 147.
[2] Marriott, *ubi sup.*, p. 49.
[3] Courtney, *ubi sup.*, pp. 110–11.

In this connection the question arises—Is it the constitutional duty of the King to consult an outgoing Premier as to who shall be entrusted with the task of forming a new administration? On this, constitutional authorities are not agreed. Professor Lowell answers the question affirmatively, and Sir William Anson answers it in the negative.

To this is related another problem. If a Prime Minister desires to test the feeling of the electorate, or to seek a renewed vote of confidence from it, and advises a dissolution, is the King bound to follow that advice? It is a part of the Royal prerogative to dissolve Parliament. It would seem that the most a Prime Minister can do is to advise the King to dissolve, but the King is at liberty to accept or reject the advice. No constitutional monarch will, ordinarily, reject such advice. The grounds for accepting it are, usually, that the Prime Minister of the day and his Cabinet no longer possess the confidence of the House, although there may be cases where the Prime Minister actually commands a majority, but desires to initiate either legislation or a policy of so revolutionary or novel a character that the Sovereign deems it desirable that the opinion of the electorate should be taken. This was the position in 1910, when Mr. Asquith commanded a substantial majority, but went to the country twice in that year to obtain mandates for the Lloyd George Budget and the passing of the Parliament Act. Mr. Ramsay MacDonald's position in 1924 was different. He was in a minority, and dependent on the good will of the opposition parties. After he had been defeated on a vote of censure over the Campbell case, there was no option for him but to advise the King to dissolve Parliament.

The question whether a Governor should accept the advice of a Prime Minister to dissolve has arisen on several occasions

in the self-governing colonies.[1] The most recent instance was in 1926, when Mr. Mackenzie King, the Canadian Prime Minister, advised Lord Byng of Vimy, the Governor-General, to dissolve Parliament. This Lord Byng refused to do, and Mr. Mackenzie King thereupon resigned. The new Prime Minister, Mr. Meighen, was unable to command a majority in the Canadian House of Commons, being defeated on a vote of confidence by one vote. The result was that there was a dissolution after all, followed by a general election, at which Mr. Mackenzie King was returned to power. The refusal of the Governor-General to grant a dissolution caused great controversy. Mr. Mackenzie King's contention was that in the Dominions the Governor-General must follow the same procedure as the Crown in Great Britain—that is, accept the advice of the Prime Minister. In Canada, the Governor-General has the same power of dissolution as is possessed in Great Britain by the King, for the Letters Patent issued to the Governor-General empower him "to exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving the Parliament of Our said Dominion." The whole difficulty lies in the application of this power. In England, constitutional authorities have always held that the King is not strictly bound to dissolve, but that

[1] Lord Courtney says (*ubi sup.*, p. 9): "In the self-governing colonies, where parliaments have been established on the pattern of that of the United Kingdom and where the Governor bears the same relation to the Ministers as the Crown bears to its Ministers at home, the advice to dissolve the Assembly corresponding to the House of Commons has been often rejected. This has been done where the Assembly has been very recently elected, and the Governor for this, or for some reason in his judgment equally cogent, believes that it reflects the will of the constituencies, and that a new election is uncalled for, and would be vexatious. The Governor, however, in refusing to accept the advice to dissolve, must be prepared to accept the resignation of his Ministers; and his refusal can be maintained only where he finds other men ready to undertake the ministerial functions."

he will seldom, if ever, refuse to follow the advice. "The refusal of a dissolution is much too dangerous a course for the Crown to take; it at once reduces the Crown, however reluctantly, to be a partisan in a political struggle." In the last resort, the decision must rest with the people, and all the Governor-General does, by dissolving, is to place the decision in their hands. The true answer seems to be that, until a Prime Minister has actually resigned, he is still Prime Minister, and is entitled to expect that advice given by him in that capacity will be accepted by the King or by a Governor-General. It is, of course, possible to conceive a case where a Prime Minister resigns out of pique, or for a mere whim, but ordinarily it may be assumed that his advice to dissolve is based on adequate grounds. In future, the decision of such a problem will probably always be based upon precedents obtaining in Great Britain, for as a result of the Inter-Imperial Relations Report of 1926 the Governor-General will henceforward occupy the same relation towards his Ministry as the King does towards his Cabinet.

The case of a dissolution has also been the subject of recent legislation in the Union of South Africa. In 1926, an alteration in the Constitution of the Union (the South Africa Act) was effected by what is known as the Senate Act, whereby the Governor-General "may" (not "must") dissolve the Senate within 120 days of any dissolution of the House of Assembly. Assuming that such a dissolution is inevitable, then the nominated Senators vacate their seats, as well as the elective Senators, and those nominated in their places hold their seats either for ten years or until the next dissolution, or until a "change of Government" occurs, whichever is the earlier—"change of Government" being defined as "whenever another person than the Prime Minister for the time being becomes

Prime Minister." The result, in effect, is that if a Union Prime Minister resigns, the Senate is *ipso facto* dissolved.

In the words of Mr. Marriott, an English Cabinet Minister acts in a fourfold capacity: he is an adviser of the Crown; he is a parliamentary and party leader; he is a member of the political Committee which rules the United Kingdom and the British Empire; and finally he is, with few exceptions, the head of an administrative department.[1] The discharge of all these functions, especially the last, has rendered necessary the appointment of a much greater number of Ministers in modern times, and several recent Ministries have contained over fifty members. This circumstance in itself has made it impossible to include all the Ministers, or even a majority of them, in the Cabinet. It is manifestly inconvenient that the business of a Cabinet, which is ordinarily of a highly confidential nature, and frequently requires prompt decisions, should be confided to a body of men which in numbers approaches that of a small legislature. Many Ministers, also, are assistants or subordinate to others who are the heads of the department in and for which such Ministers discharge their functions. It is sufficient, for Cabinet purposes, that a single Minister should attend its meetings as the representative of his Ministry or department, leaving to his colleagues in the same department the duty of seeing that Cabinet or parliamentary decisions or orders are carried out; in other words, the general control of the detail work. In former years, as we have seen, the Cabinet consisted of a comparatively small number—of seven, or, perhaps, ten members; and although in recent times the number has increased to as many as twenty, or even slightly over, such a number is unwieldy, especially when rapid decisions of great national importance have to be taken. It may even happen that

[1] *Ubi sup.*, p. 102.

some members of the Cabinet remain ignorant or unaware of decisions which have been taken in the name of the Cabinet as a whole. During the Great War it was found necessary to revert to the old practice of having a sort of super-Cabinet, consisting of a very small number of leading statesmen, so that there should not only be the observance of great secrecy, but extreme promptitude in action.

Whatever the numbers of the Cabinet, or of the Ministry as a whole, it is clear that there is joint and undivided responsibility to Parliament. A Minister can never plead that he was ignorant or unaware of what his colleagues were doing. "The first mark of the Cabinet, as that institution is now understood, is united and indivisible responsibility." [1] In other words, there must be political homogeneity, which is accompanied by the ascendancy of the Prime Minister, for the leadership must reside in some one person, and cannot be shared. Another corollary of the Cabinet system, which means the share of Ministers in the work of Parliament and their responsibility to it, is the exclusion of the Sovereign from its councils—for the Sovereign takes no part in politics. When the King sat at the Council board, he was to a certain extent politically responsible. Since he ceased to take part in ministerial deliberations the responsibility has been borne by the Ministers entirely, with the result that the Sovereign has no responsibility whatever for the conduct of public affairs.[2]

At the same time as the Ministry has grown in influence and authority during the past two centuries and a quarter there has been a corresponding decline in the position which the Privy Council, as a governing body, once occupied in the affairs of State. At one period the Privy Council, with its committees or sub-committees, like the Star Chamber, was

[1] Morley's *Walpole*, p. 156.

[2] See Marriott, *ubi sup.*, pp. 78–9.

all-powerful, and it even overshadowed Parliament. Its functions from very early times were judicial, but they were distorted in order to serve the Royal purposes, and it became the handmaid of tyranny. After the development of modern constitutional government, the inner circle or committees of the Council became the germ of the modern Cabinet, as above stated. The larger body, or outer circle, consisting of an undefined number of distinguished men nominated in a purely honorary capacity, has, since the Revolution of 1688, shrunk into comparative insignificance. Nominally, Privy Councillors are bound by their oath to advise the King, and to stand by him in his measures, but the body, as a whole, never assembles, although it has been summoned to meet for purely formal purposes on the accession of a new Sovereign. Only a natural-born or naturalized subject of the King may be a Privy Councillor. The business which is transacted by the King in his Privy Council is now done by the Sovereign with the assistance of one or two Ministers and a member of the Royal household, or one or two of the great peers, together with the Clerk of the Privy Council. At such meetings the formal business of signing Orders in Council or Proclamations, or other State documents, is transacted. Such meetings, therefore, are only necessary to give efficacy to transactions which have to be performed by the Sovereign in order to carry out the decisions of the Government, or to issue orders or regulations which are called for by virtue of some statutory provision.

Apart from this, the remaining functions of the Council are discharged by two or three committees. Nominally, the supervision of national education is carried out by a committee of the Council. The most prominent committee is the Judicial Committee, which, as previously stated, is the final appellate tribunal for the British possessions outside Great Britain and

for ecclesiastical causes and appeals from prize courts in Great Britain. The Judicial Committee is regulated and has its powers defined by the Judicial Committee Act of 1833. It consists of the Lord High Chancellor and the holders of or persons who have held certain judicial offices in England, certain colonial judges, and certain former holders of judicial offices who have been specially nominated by the Crown to sit in appeals brought before the Committee. Nominally, the Lord President of the Privy Council is a member of the Judicial Committee—but this is only to preserve the historical tradition from the time when the Council, as a whole, discharged judicial functions, for now the Judicial Committee is connected with the main body by little more than its name.[1]

According to Lord Courtney, the Privy Council has no legislative authority. The proclamation by it of law on special occasions, by means of Orders in Council and Proclamations, "cannot make anything legal or illegal which is not so through higher authority." [2] It is true that most Orders in Council are issued under powers conferred by some statute, and that other administrative acts done by it under the common law are "little more than solemn registrations of ministerial acts." But there have been instances where Orders in Council have been issued, as in time of war, without special statutory authority. Indeed, it would seem to be the duty of the Crown, failing statutory powers, to issue such Orders in order to preserve international duties of the State, such as prohibition of contraband. The mere admission of common law powers in the Privy Council to perform administrative acts indicates that it must have, if not a legislative, at least an administrative jurisdiction apart from Parliament, for Parliament only acts through statutory enactments. In early times a free use was

[1] Hannis Taylor, *ubi sup.*, vol. ii, p. 565. [2] *Ubi sup.*, p. 113.

made of the ordaining powers of the Privy Council, which even resorted, on occasion, to taxation. Powers to tax, and generally to enact laws, disappeared when Parliament claimed and successfully asserted control of taxation and legislation. Nevertheless, some residuum of ordaining power was left in the Privy Council, and it is by virtue of this that, on occasion, Orders in Council have been issued independently of any statutory authority from Parliament. The validity of such Orders in Council has not been brought into question.

An account of the executive and administrative side of government would be incomplete which did not take note of the fact that, apart from the provision by statute or regulation of the machinery for running the various departments of State, much depends for the successful working of the whole organism on the living persons who have to discharge its various functions. Behind all the formal devices for maintaining regularity and continuity, behind all the alleged existence of "red tape and circumlocution," there is a large body of servants of the State who must work in harmony and with mutual adaptability if the task of government is to be at all successfully carried out. Apart from routine, there must be tradition. It is true that tradition may tend to become stereotyped, but unless there is continuity there will be confusion. The cogs of the machinery must fit into each other. The traditions of the public service have been evolved as the result of experience, which is the experience of a large body of men with similar training, common aspirations for the public welfare, and knowledge of each other's methods and devices for overcoming difficulties which might become insuperable obstacles if there were too strict an adherence to the letter of the law. The "personal equation" counts for much. A great deal is accomplished by tact and common sense, and that familiarity which is the result

of years of work in neighbouring offices, and the use and wont of daily life. There is a general spirit of comradeship, and no harm is done by the fact that a private secretary is familiarly known as "Eddie" or "Jack" from one end of Whitehall to the other, or that civil servants lunch together in the clubs of Pall Mall. These amenities grease the wheels of the official machinery. It is a tribute to its successful working, on the whole, that notwithstanding periodical outbursts on the part of the Press, and much satirical literature, there have been, within the past century, practically no proved cases of oppression, or corruption, or of damage suffered by the ordinary citizen.[1] The civil service, as a whole, animated by equally high motives with those which by tradition are associated with the Army and the Navy, have faithfully discharged their duty to the Sovereign and the citizens of the State.

These traditions of government have been carried into the public services in the colonies oversea. The machinery of government there is run on much the same lines, and the result is that a system has grown up which, though sometimes criticized, has earned the respect not only of the colonists, but of foreigners as well. Particularly is the exercise of tact and discretion called for in the government of subject races—the "lesser breeds *within* the law." Here and there occasions have not been wanting for criticism, but, on the whole, the traditions of impartiality and justice have been maintained.

In a Crown colony or a protectorate, much must depend upon the Governor or administrator. It has been said that, subject to his liability ultimately to be called to account by the Colonial Office or by Parliament, he is, during the term of his

[1] The only case one recalls of corruption is that of certain detective officers at Scotland Yard, who, in 1877, were found guilty in connection with the frauds practised by Benson and others upon Madame de Goncourt.

office, and while discharging its functions, practically an autocrat. This does not, however, mean that he is above the law. He is accountable for his acts not only to his departmental superiors, but in the English courts, and he may, as instances in past colonial history show, be held criminally as well as civilly responsible. He must act within the terms of his Commission or Instructions, apart from observance of the ordinary law. The "autocracy" of the Governor means that, apart from advice tendered to him by his Executive Council, or by the heads of departments, he must exercise his own discretion, but it is a discretion to be exercised in accordance with justice and legal principles. His responsibility is always a personal responsibility, and in this respect it differs from that of a Governor-General in a Dominion, who, as previously stated, occupies relatively to his Ministers the same position as the King does in Great Britain.

CHAPTER IV

THE JUDICIARY

The traditional division of powers of government is into executive, legislative, and judicial functions, and in theory they are rigidly separated from one another. In actual fact, however, no State has ever succeeded in entirely divorcing them. The executive power may be entirely separate from the legislative arm, but legislatures have invariably obtained the control of the public purse, which in the ultimate resort means the control of government. A strong or a tyrannical executive may succeed in holding all the reins of government for a time, but sooner or later the horses will become restive, and the coach may be overturned. So with the judiciary. Ideally, its members should be remote from the madding crowd's ignoble strife, and in practice most conscientious judges endeavour to act upon this principle. But a judge must at one time or other have taken part in administrative or legislative affairs, unless his selection has been made rigidly on the score of legal attainment. The appointment of all judges rests with the executive, and no Government has ever foregone the privilege of making such appointments, with the exception of the United States, where certain judgeships are filled by popular vote—a system far from ideal. Perhaps the most satisfactory mode of appointment would be selection by a committee of veteran judges, acting in consultation with the leaders of the legal profession. Failing this method, the builders of the British constitution have arrived at a solution which is, perhaps, the best, if the independence of the judiciary is to be secured.

In England (and the principle is followed throughout the British Commonwealth), the judges of the superior courts, in terms of the Act of Settlement, are appointed during good behaviour, with salaries the amount of which may not be changed during their term of office, and they are removable from office only upon an address to the Crown from both Houses of Parliament. The judiciary is thus placed above the caprice or the tyranny of the Executive Government. There can be no doubt of the beneficent change effected by this provision in the Act of Settlement, when we contrast the position of judges in the seventeenth century with that which they have occupied since that age. There has been no instance of the removal of a judge on an address of both Houses. There has been one case of corruption, that of Lord Macclesfield. He, however, was Lord Chancellor, appointed only for the duration of the Ministry to which he belonged; but he resigned in order to escape the consequences of his offence. He did not escape them, however, for he was adjudged guilty by the House of Lords upon an impeachment. In any event, no statutory provision can ensure that the private character of holders of judicial or other appointments shall be above reproach. But there has only been one instance in the last two centuries of flagrant personal misconduct on the part of an English judge. Perhaps the only criticism to be passed on the provision in the Act of Settlement is that it makes the position of the judges, if anything, too secure. A judge is entitled to remain on the Bench at an age when he is no longer in possession of all his faculties, physical if not mental; and there is no remedy against incompetence in respect of legal knowledge or inability to discharge the judicial faculty aright. On the other hand, the great positive advantage is the independence of the judges and, on the whole, their impartiality.

The high reputation which has been maintained by the English judges has caused many enthusiasts to speak in unqualified terms of admiration of "British justice," as though it were some special sort of product. Those who speak in this strain do not render any service to the jurisprudence of their country, which has as many flaws and defects as any system prevailing elsewhere. All human systems of jurisprudence, English or Roman, insular or Continental, are founded on the same broad principles of equity and justice, and it would be difficult to assign a higher place to one system than another, when all of them largely derive from the same sources. It is too often forgotten that the learning of Henry de Bracton, the father of English Law, derived much from the Roman law, and that the Canon Law, also based on Roman law, is, in essence, the law of the English ecclesiastical tribunals. One system of legal *administration* may be better than another, but it is not easy to affirm the superiority of a particular system of *jurisprudence*, more especially when the broad underlying principles are everywhere the same. After all, the general aim of all jurists, as exponents of justice, is "to render to each man his due."

The distinguishing feature of the English courts is that while, in respect of their jurisdiction, they have maintained continuity with the judicial administration prevailing in very early times, they have continuously kept abreast of the requirements of the age, both by means of reforms in their internal constitution and by the frequent promulgation of new rules of procedure, which the Lord Chancellor and the judges have power to make. The jurisdiction of the King's Bench and the Courts of Chancery, and their application of legal rules, derive from the Middle Ages; but the changing conditions of modern life have made it necessary for these courts to adapt their

procedure, and their application of legal principle, to fresh requirements and developments. Thus, entirely new fields of jurisprudence have been explored—in the King's Bench Division, the principles relating to liability for damage arising out of modern means of transportation, newspaper libel, and commercial and revenue cases; in the Chancery Division, the important department of company law. And the administration of justice has been accelerated. This process began with the passing of the Common Law Procedure Act of 1852, and was continued with the reconstitution of the superior courts during the years 1873 to 1876. Also, justice has been rendered easy of access to the small man with the small case, by the institution of the County Courts, whose judges, all of them barristers, are in fact magistrates with civil jurisdiction. Complaint has been made of the delay attendant upon the circuit system, administered by the assize courts. This may or may not be well-founded. The principal ground of complaint, as far as the liberty of the subject is concerned, is the length of time prisoners are sometimes kept awaiting trial. On the whole, however, the administration of criminal justice is speedy. Conspicuous examples of this are to be found in the work of the Central Criminal Court and the County of London Sessions. And the institution of the Court of Criminal Appeal has introduced greater certainty and security into the criminal law. More important still, the application of criminal justice is more humane; and some critics have gone so far as to discern in certain criminal judges and magistrates a tendency to sentimentality. But the more humane treatment of prisoners, and the imposition of shorter sentences, as well as the probation system for first offenders, have had their effect in the diminution of serious crime, although signs are not wanting that the facilities afforded by modern inventions, and the temptations

offered by the lavish display of wealth and luxury, may tend to a temporary, if not permanent, increase in the number of offenders.

Perhaps the criticism which has most to justify it is that which is directed against the petty sessions courts, conducted by the unpaid justices of the peace, who, as a rule, have no legal or judicial training, and frequently have to delegate their functions, in effect, to the clerk of the court. Justice should not only be speedy, but competent; and there are many who believe that, though it may mean greater expenditure upon salaries, it would be better to entrust the work of petty justice to stipendiary magistrates, in the same way as in London or the large provincial centres of population. On the other hand, there are those who complain of the disproportionate influence which is already exercised by the legal profession, from whose ranks such magistrates will have to be drawn. The only alternative would be the institution of a professional class of magistrates, such as exists in France. Such a system, however, is not consonant with English tradition; and it is doubtful whether it will ever be adopted.

Another reform which has been advocated is the abolition of too numerous appeals. The House of Lords Court is the final appellate tribunal for England and Scotland; and the same members, or most of them, constitute the Judicial Committee of the Privy Council. Below the House of Lords Court is the Court of Appeal, which was at first intended to be the final appellate court, though its constitution was changed not long after it had first assumed its functions, and an appeal lies from it to the House of Lords. The great majority of appeals, however, terminate with the Court of Appeal; and, as a rule, only those resort to the House of Lords who need not consider the expense, or those who do not consider it. The multiplica-

tion of appeals would appear to be unnecessary. By statute, certain decisions of the Court of Appeal are final, and in respect of them there is no appeal to the House of Lords. In certain of the Dominions (like South Africa) the parties may, under certain circumstances, consent to appeal to the final court in the Dominion, passing over an intermediate appeal court.

It has also been suggested that in the courts of first instance a judge should be competent to try any class of case, whether arising at common law, in equity, or matrimonial. This is the system existing in some of the Dominions, although in Canada, for example, the division between common law and chancery courts was adopted. Under the Judicature Acts a judge may decide any question, whether arising at law or in equity; but the division of the courts, and their restriction, in the main, to the classes of actions traditionally tried by them, has continued. The history of the law has, however, shown the responsiveness of the courts to new requirements, and there seems to be no reason to doubt that this process will continue.

CHAPTER V

THE SUBJECT

The laws are made, and the machinery of government has been devised, for both the control and the protection of the inhabitants of the country. These are ordinarily termed citizens, although "citizen," in its strict sense, means a person who is in the enjoyment of civic rights, that is, who has the full status and privileges of a freeborn subject of the State. The term "subject," again, has departed from its original meaning of a person under subjection or servitude, for, without entering into abstract discussions of the original rights of man and his relation to the State, it may be said, broadly, that the government of the country rests on an unwritten compact between the citizens and the ruler that they shall be obedient to the laws, which shall at the same time be enacted not for the benefit of the ruler alone, but for the conservation of the State and the protection of each individual inhabitant—in other words, government rests upon the consent of the governed. Even in feudal times, it has been stated, it never became law that there was no political bond between men save the bond of tenure.[1] While it was true that fealty was due by all, the Sovereign was at the same time the protector of all—and, even if few persons in those days had any voice in public concerns, such as is evidenced by the enjoyment of the right to vote for the election of their representatives in Parliament, the forces of the State, whether for disinterested motives or not, were frequently employed to curb

[1] Maitland, *Const. Hist.*, p. 161.

the pretensions of the powerful feudal nobility, the "barons," and of the equally powerful ecclesiastics who were themselves feudal lords; while, on the other hand, there were laws regulating the respective rights of freeholders and of persons of servile birth, and, in later times, of masters and labourers, of guild craftsmen and apprentices, of knights and men-at-arms, of landlords and tenants. It is true that, in the fourteenth century, the charters of manumission which had been granted to the villeins were not observed, and that this led to the uprising of 1381, but the movement was, in reality, only part of the constant struggle for emancipation which has gone on in any community in which have been implanted the seeds of democratic government. "Rude and coarse as village life was," says Thorold Rogers, "it must not be imagined that it was without its hopes and aspirations. The serf could arrange with his lord to remove to a neighbouring town, and there prosecute his fortunes, perhaps emancipate himself. The king, when war arose, would look out the likeliest and most adventurous of the youth of all ranks and employ them in his army with good pay and prospects of plunder and ransom. . . . Many a peasant . . . was eager, out of his scanty means, to buy the licence that his son might go to the schools and take orders. Perhaps with these openings for himself and his kind the yoke of dependency did not press very heavily on him. But the lord must beware of breaking the customary bargain between himself and his serf. He once attempted to do so, and a sudden and unexpected revolution shook England to its centre, and, though organized by serfs, was a memorable and perpetual warning." [1] Common law rights protected the man of inferior status, and they were reinforced at intervals by Acts of Parliament, until to-day all men of full age and sound mind are on an equal footing.

[1] *Six Centuries of Work and Wages*, p. 68.

The subjects of the King are divided into two main classes —those who owe permanent allegiance to the Crown, that is, British subjects by birth or by naturalization; and those who owe temporary allegiance, namely, aliens or foreigners, who are citizens of some foreign State, or who, negatively, are not citizens of Great Britain or some part of the British Empire.

A natural-born British subject is either (*a*) any person born within His Majesty's dominions and allegiance; (*b*) any person born out of His Majesty's dominions whose father was at the time of that person's birth a British subject, and who fulfils any of the following conditions, i.e., if either (1) his father was born within His Majesty's allegiance, or (2) his father was a person to whom a certificate of naturalization had been granted, or (3) his father had become a British subject by reason of any annexation of territory, or (4) his father was at the time of that person's birth in the service of the Crown, or (5) his birth was registered at a British consulate within one year, or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, or, in the case of a person born on or after January 1, 1915, who would have been a British subject if born before that date, within twelve months after August 1, 1922; (*c*) any person born on board a British ship, whether in foreign territorial waters or not. The child of a British subject, whether that child was born before or after August 7, 1914, is deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means His Majesty exercises jurisdiction over British subjects, e.g. in a protectorate. A person whose British nationality is conditional upon registration at a British consulate ceases to be a British subject unless within one year after he attains the age of twenty-one, or within any extended period

as authorized in special cases—(1) he makes a declaration of retention of his British nationality and registers the same in the prescribed manner; and (2) if he is a subject of a foreign country, under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.

Except as expressly provided, that is, with regard to children of British subjects, the status of any person born before January 1, 1915, is not affected.[1]

A naturalized British subject is a person who has received a certificate of naturalization as such. Under the British Nationality and Status of Aliens Act, 1914, the Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose and satisfies the Secretary of State—(*a*) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by the governing section of the Act, or been in the service of the Crown for not less than five years within the last eight years before the application; and (*b*) that he is of good character and has an adequate knowledge of the English language; and (*c*) that he intends, if his application is granted, either to reside in His Majesty's dominions or to enter into or continue in the service of the Crown. The residence required by the section is residence in the United Kingdom for not less than a year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application—except that, in the case of a woman who was a British subject previously

[1] British Nationality and Status of Aliens Acts of 1914, sec. 1; 1918, sec. 1; 1922, secs. 1, 2.

to her marriage to an alien, and whose husband has died, or whose marriage has been dissolved, the requirements as to residence are not to apply; and the Secretary of State may also, in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years' residence or five years' service has not been within the last eight years before the application. It is in the absolute discretion of the Secretary of State whether or not to grant a certificate of naturalization. A period spent in the service of the Crown may, at his discretion, be treated as equivalent to a period of service in the United Kingdom. On receiving intimation that his application has been granted, the applicant must take the oath of allegiance.[1]

Under the Act of 1914 the Government of any British possession has the same powers as the Secretary of State to grant or revoke a certificate of naturalization, and such certificate has the same effect as one granted by the Secretary of State.[2] This means that a certificate duly granted to an applicant anywhere in the British Empire makes him a British subject throughout the Empire. In a self-governing Dominion the English Act must first be adopted by the legislature, after which the Government of the Dominion may make regulations and provide how and by what department their powers are to be exercised; and such legislature may also rescind the adoption of the Act.[3] In a British possession other than a self-governing Dominion the power to naturalize must be exercised by the Governor or a person acting under his authority, but is subject in each case to the approval of the Secretary of State, and any certificate proposed to be granted is to be submitted to him for his approval.

It follows that naturalization granted in any British colony

[1] Nationality Acts of 1914, sec. 2; of 1918, sec. 2. [2] Sec. 8.

[3] The English Act was adopted, for example, in South Africa, by Act No. 18, 1926.

or in a Dominion which has adopted the terms of the English Act is equally effective with naturalization granted in Great Britain. Ever since the English Naturalization Act of 1870, the legislatures in the British possessions have had power to grant local naturalization.

The effect of naturalization of an alien is that he is entitled to all political and other rights, powers, and privileges, and is subject to all obligations, to which a natural-born British subject is entitled or subject in the United Kingdom. Formerly, however, under the Act of 1870 a naturalized British subject was not to be deemed such within the limits of the foreign State of which he was a subject previously to British naturalization unless he had ceased to be a subject of that State under its laws or under a treaty to that effect. Now, however, the effect of the Act of 1914 is that an alien who has been naturalized under that Act does not cease to be a British subject when within the limits of such foreign State.

An alien woman who marries a British subject by her marriage becomes a British subject. A woman who is a British subject becomes an alien by her marriage to an alien. If a man ceases during his marriage to be a British subject, his wife may make a declaration that she desires to remain a British subject, and thereupon she is deemed to remain a British subject. An alien woman who marries a British subject does not on his death or on her divorce cease to be a British subject.[1]

Alien friends are the subjects of a foreign State at peace with Great Britain who are residing within British territory. While in such territory they owe temporary allegiance to the Crown in the same way as a British subject, and must obey the laws of the country. They may own real and personal property, may make wills and bequeath property, are subject to the

[1] *Fasbender* v. *A.-G.*, (1922) 2 Ch. 850; British Nationality Act, 1914, secs. 10, 17.

bankruptcy laws, are liable to prosecution for crimes, may bring and defend civil actions, and are liable, if domiciled in England or Wales for ten years, to serve on juries. They may not, however, become members of the Privy Council, hold any office under the Crown or any office of trust, may not exercise the parliamentary franchise or sit in Parliament, and may not exercise the municipal franchise or vote at any county council or parish council election or parish meeting.[1]

Aliens have, at common law, no right to enter or reside within the realm. Their immigration is now regulated by the Aliens Restriction Acts, 1914 and 1919, under which the definition of "undesirable aliens" under the former Aliens Act of 1905 still exists, that definition including persons without means of support, lunatics, or idiots, persons sentenced elsewhere for extraditable offences, and those against whom an expulsion order has been made.

The question as to who are to be deemed alien enemies arises during time of war; and it has been the subject of numerous decisions of the Courts, into the details of which we cannot enter. It is usual to pass temporary statutes restricting the movements and rights of alien enemies within the realm. At common law, a British subject may hold no intercourse, by way of trade or otherwise, with an alien enemy. For this purpose the test of enemy status is not nationality, but the place of carrying on business. Thus, a British subject or the subject of a neutral State who resides or carries on business in an enemy country is an alien enemy; and so are the subjects of that country, whether residing therein or residing in the British Dominions without a licence. In other words, local and not natural allegiance furnishes the test.

[1] A naturalized alien, born out of the British dominions and not of British parents, may be appointed to the Privy Council (*R. v. Speyer*, 1916 (2) K.B. 858).

Women, as previously stated, now exercise the parliamentary franchise, and may sit in Parliament in Great Britain; and they also have the franchise in Australia and New Zealand. And, by the Sex Disqualification Removal Act, 1919, a woman is now qualified to exercise any public function or civil or judicial office, or to be admitted to any incorporated society, or to serve as a juror. Thus, since the passing of the Act, women have been admitted as barristers and as solicitors. It has, however, been held that although, at common law, a woman may be a peeress in her own right, the Act was not intended to give peeresses the right to sit and vote in Parliament, and thus to effect a revolutionary change in the constitution of the House of Lords.[1]

All persons within the realm of Great Britain, or within its territorial waters, or on board a British ship, are subject to its laws. Those laws, in the case of England and Wales, are first, the common law, which is "nothing else but the common custom of the realm." In other words, it consists of those general customs which have prevailed from ancient times, or, in the somewhat vague legal phrase, "from time immemorial," and are binding upon the King's subjects. These customary rules have been expounded by the courts, whose decisions on matters of law are binding in future cases until overruled. The mass of these customary rules and the decisions upon them form the whole body of the common law. Many of these rules, however, have been altered or added to by statutory enactments contained in Acts of Parliament, and such enactments, to the extent to which they are directly applicable, override the common law and, so far as their provisions are express, displace it. There is also a large mass of general regulations and orders, issued and promulgated by various Government departments under authority conferred by statute, which are

[1] *Viscountess Rhondda's Claim*, (1922) A.C. 339.

legally binding. In particular localities, also, such as municipalities, regulations are promulgated, whether having permanent or temporary force, by virtue of statutory authority, which are binding for the locality and upon persons who reside or are found within it. The common law of England does not prevail in Scotland, which has its own separate customary or common law, largely founded upon the Roman law.

The common law of the Dominions and colonies varies with the nature of each possession. There is, or was, a fallacious notion that a British subject carried the law of England wherever he went in British or in unoccupied territory. This, however, is by no means universally the case. The proposition only holds true of uninhabited or barbarous countries. When Englishmen establish themselves or settle there, they carry with them not only the laws but the sovereignty of their own State: a corollary to which is that a British subject cannot take possession of a foreign country in his own right, and, when acquired, it becomes vested in the Crown. This applies equally to conquered countries, which, immediately on conquest, form part of the King's Dominions. But, in the case of a conquered or ceded colony, the former laws of the colony remain, until they are expressly superseded. So in the cases of the Cape of Good Hope, Ceylon, and British Guiana the Roman-Dutch law, which was the common law of these colonies at the time of conquest or cession, remained (it was abolished in British Guiana in 1914). And the old French law was retained in Canada at the time of its conquest in 1759, that is, in the existing province of Quebec. This, of course, does not prevent the promulgation of subsequent statutory enactments in such colonies, either by Act of the Imperial Parliament, Order in Council, or Act or Ordinance of the local legislature. A distinction is thus made, as to the common law,

between colonies by settlement and colonies by conquest or cession. In regard to conquered colonies, however, all laws relating to allegiance to the former sovereign, to the courts administering the law, and to the exercise of the sovereign authority, cease to be of effect from the time of conquest. If there be a treaty of cession, the terms of the treaty are to be observed. There is, in fact, no limitation on the right of a conqueror to alter the laws of a conquered country.[1] As to statute law in colonies by settlement or occupancy, the general rule is that British subjects carry with them the statute law of England as well as the common law, but only in so far as the statute law is applicable to the particular circumstances of the colony; and it has been held that they do not carry with them such statutes as the Mortmain Acts, police laws, penal laws, the Alien Acts, the Marriage and Bankruptcy Acts, and the Statute of Frauds (at least, as to the devise of lands). The presumption is that a statute only applies to the United Kingdom; it does not extend to the colonies unless they are mentioned in it or it is plain that the statute was meant for them. There is, however, nothing to prevent any English Act from being put into force in such a colony—assuming that it is not a self-governing colony—by Order in Council or other lawful means of promulgation. The legislation must, however, be by the British Parliament; whereas the King himself, as well as Parliament, may legislate for a conquered colony. But once a colony has received its own legislature, the general principle is that the local laws are made by that legislature—though, again (with the exception previously mentioned in the case of the Dominions), there is nothing to prevent the enactment of Imperial legislation extending to the colony.[2]

[1] See *Ruding* v. *Smith*, 2 Hagg. Cons. R., 380.

[2] See Forsyth (*Const. Law*, pp. 1–34), and cases cited by him; Chalmers and Asquith, pp. 170–3; Maitland, *Const. Hist.*, pp. 337–8.

Generally, no English statute is considered to apply to any British possession, whether obtained by colonization or cession or conquest, unless the intention of the legislature that it should do so appears on the face of the statute.[1]

The ordinary law is liable to be set aside and suspended, on occasion, by the temporary operation of what is known as "martial law." The application of martial law, and its meaning, are not practical questions in Great Britain to the same extent as they are in certain of the Dominions and colonies, such as South Africa, where martial law has been put into operation on several occasions.

Martial law is not to be confused with military law, which is the law ordinarily applicable to the regulation, discipline, and conduct of the military forces of the Crown, and is in regular operation, although statutes like the Army Act require renewal annually. Nor is it the law administered in ancient times by the Constable and Marshal, which has long been obsolete. Nor is the term applicable to the law administered by British generals in occupied districts of enemy territory in time of war, or in occupied districts of ex-enemy territory. This is, in effect, the administration of such territories at the discretion of the commander, and is part of the operations of war, for the purpose of ensuring the safety of the troops, their supplies, and their lines of communication, and for regulating and controlling the conduct of the civilian population. As to this, which is also popularly spoken of as martial law, the courts of law cannot, where war actually prevails, entertain proceedings against or inquire into the acts of military men and others acting under their directions.[2]

Martial law, in the strict sense of the term, is the suspension

[1] Maitland, *ubi sup.*, p. 338.

[2] *Ex parte Marais*, (1902) A.C. 109; *Marais* v. *G.O.C. Lines of Communication*, 71 L.J.P.C. 42.

of the ordinary law, and the substitution for it of discretionary rule by the Executive Government, exercised through the military forces, or with the military power, because certain things may, if necessary, be done with the aid of civilian officials. It is not, strictly speaking, law at all, for it consists of arbitrary rules issued to secure the end in view, and not necessarily or even usually passed or promulgated according to ordinary legislative forms. These rules are temporary, because they last only during the existence of martial law; and they may even be momentary in their duration, applicable not to all persons, but merely to a single individual. It follows that, although it is usual, where circumstances permit, to issue proclamations or notices prescribing general rules or a course of conduct to be observed by the population subject to or placed under martial law, proclamation is not in all cases a necessity, so far as the detailed rules themselves are concerned, although it is usual, in order to convey the necessary information to the people affected, to proclaim the existence of a state of martial law, or what is known on the Continent as "a state of siege." For this reason martial law is said to be no law at all. It is, in fact, merely the law of necessity, depending on the will of those who employ it, and to be justified entirely by the necessities or exigencies of the case. Consequently, the courts have full jurisdiction to inquire into the exercise of this form of government, and to judge in any case whether the necessity was such as to justify its being brought into operation, or to what extent the limits of such necessity had been exceeded. This, however, does not prevent the ordinary courts from sitting to try ordinary cases, civil and criminal, during the time when martial law is actually in operation, in so far as their functions have not been interfered with or superseded by the proclamation of martial law or the actions of the martial

law authorities. And, side by side with these courts, there may be courts, composed of military officers or of civilian magistrates, for the trial of purely martial law offences, which offences may be arbitrarily defined to meet the needs of the occasion. In Great Britain it is not a part of the Royal prerogative to proclaim martial law in time of peace; and it has not been proclaimed in time of war since the reign of Charles I. In the colonies, as above stated, it has been brought into operation.

Several constitutional authorities state that martial law is unknown to the constitution; and some of them go so far as to lay down that it cannot in any event exist in time of peace. While these views may be justified according to the strict letter of the law, they cannot, in the light of actual experience, be regarded as other than doctrinaire. It is unfortunately a fact that martial law, though its very name implies the existence of war or hostilities, has frequently been proclaimed in the colonies in time of peace. In other words—and without going into the question whether in any particular case it has been justified or not—it has in fact brought about a state of temporary war. Its mere application is an admission, or a contention, that the ordinary law or mode of legal procedure is not adequate to the occasion; and not even the most arbitrary administrator or "controller" of martial law has ever had the hardihood to contend that he made use of it or applied it in accordance with the principles of ordinary law. It is for this reason that Governments have found it necessary, after the application of martial law has ended, to procure the passing of Acts of indemnity in order to obtain legal protection and immunity for the acts of themselves and their subordinates during the existence of martial law.

In England, at common law, the Crown, as conservator of the peace of the realm, is entitled, in case of riot or disturbance,

to take steps to quell the disorder. It is the duty of all citizens to aid in the restoration of the public peace, and any citizen may be called upon to give his aid for that purpose. The measures to be taken are strictly limited to the necessities of the case. If the necessity justifies it, citizens, including magistrates, are punishable if they do not aid in restoring order. On the other hand, any person who uses excessive or cruel means is punishable if he acts in excess of the necessities of the case. Even military force may be employed to suppress any such disorder; and the Riot Act does not authorize the employment of troops, which in any event is justified under the common law in case of necessity, but aids the enforcement of the ordinary law by enacting that if twelve rioters continue together for an hour after a magistrate has made a proclamation to them in terms of the Act ordering them to disperse, their assembly becomes a felonious assembly, and the magistrate may command the troops to fire upon the rioters or charge them sword in hand. In other words, the Riot Act gives authority for the forcible suppression of what it constitutes a crime, though an assembly is already riotous, and therefore punishable, even before the proclamation under the Act is read.[1]

For the protection of the subject, certain safeguards have been created, which, as is well known, have not been the outcome of spontaneous legislation, but have been the outcome of historic struggles for liberty. In their original form they are contained in *Magna Charta* (1216), the Petition of Right (1628), and the Habeas Corpus Act (1679). These provisions,

[1] For full discussions of the subject, see Forsyth, *Cases and Opinions*, pp. 188–216, 481–564; Dicey, *ubi sup.*, pp. 280–90, 538–55; Maitland, *ubi sup.*, p. 217; Chalmers and Asquith, pp. 61–70. As to the distinction between military law and martial law, the author may be permitted to refer to his own experience at the time of the Boer War, when, before the same tribunals, he defended soldiers on charges of sleeping on duty or desertion, and civilians for "breach of the oath of neutrality."

in so far as they are designed to secure practical ends, have been modernized and made readily applicable by rules of procedure designed to secure facility in administration. The Great Charter dealt with a variety of matters, and, broadly, summed up the traditional liberties of the nation. Its provisions are classed under two heads—those specially relating to the rights and privileges of the three estates, the clergy, the baronage, and the commons; and those relating to the rights and privileges of the nation at large. The particular provision with which we are now immediately concerned is that which declares that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or anywise destroyed; nor will we go upon him, or send upon him, but by the lawful judgment of his peers, or by the law of the land. To none will we sell, to none will we deny or delay, right or justice." The "judgment of his peers," as previously explained, is not trial by jury, but trial by members of the old feudal and county courts. In other words, a man was guaranteed trial by the courts which regularly had jurisdiction over him; and he must be tried in due form, and according to law; nor was there to be any discrimination—there must be equal justice for all.

The Petition of Right, which is a statute, having received the reluctant assent of Charles I, stipulated, firstly, that no man should be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by Act of Parliament. *Magna Charta* had already provided that there should be no scutage or aid, i.e. no taxation, other than the three regular feudal aids, but by the common counsel of the nation, which can only be taken in a national assembly summoned in the manner which the law directs. These two great constitutional documents thus establish the general principle, which is a binding rule, that taxation may only be

imposed by Parliament. Two other provisions of the Petition of Right may be regarded as designed to meet what may now be looked upon as exceptional cases, though they were burning grievances at the time of its enactment—the clause prohibiting the billeting of soldiers in private houses, and that protesting against commissions of martial law in times of peace. The most important stipulation in the Petition, however, as far as the ordinary daily life of the citizen is concerned, is that which declares that there shall be no arbitrary imprisonment of the King's subjects without due process of law, and without any cause shown. The Petition of Right, like *Magna Charta*, though they both stated principles in regard to unlawful imprisonment which have ever since been regarded as constitutional maxims of the utmost solemnity and importance, nevertheless devised no practical remedy. This was effected by the Habeas Corpus Act (1679). A writ of *habeas corpus*, whereby all imprisoned persons might obtain an order of the Court of King's Bench to the keeper of the prison, commanding him to bring up the body (i.e. the person) of the prisoner with the cause of his detention, so that the court, after examination, could either discharge, bail, or remand him, according to the facts, already existed at common law. It was similar to a prætorian writ which had existed for many centuries in the Roman law, known as the writ *de libero homine exhibendo*. But it was hedged round with many complications; and its provisions were evaded by imprisoning persons under the direct command of the King. The Act of 1679 now provided that the Lord Chancellor, or any of the judges, where a person is charged with any crime, unless such person be committed for treason or felony plainly expressed in the warrant or for being an accessory thereto, shall, upon viewing a copy of the warrant, or an affidavit that a copy is denied, award a writ of *habeas corpus* for such prisoner,

returnable immediately before himself or any other judge; and upon service thereof the officer in whose custody the prisoner is shall bring him before the court, with the return of such writ, and the true cause of the commitment; and thereupon, within two days after the party shall be brought before him, the Lord Chancellor or other judge shall discharge the prisoner, if the charge be of a bailable offence, or on giving security, to be fixed at the discretion of the court, to appear and answer to the accusation. The writ cannot be claimed by a person who has neglected for two whole terms after his imprisonment to apply to any court for his release. The object of the writ is to protect persons against imprisonment without cause, or without bail where bail should be allowed, or imprisonment without trial. To secure due trial, even in the case of offences which are not bailable, the Act further provides that every person committed for treason or felony must, if he requires it, be indicted the first week of the next term, or the first day of the next session of oyer and terminer (i.e. criminal sessions of a court competent to try him), unless it appears on oath that the Crown witnesses cannot be produced at that time; and, if acquitted, or not indicted or tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence.

The Act of 1679 was, however, by no means complete. It dealt only with cases where crime was alleged. By a subsequent Act,[1] the writ was made applicable also to cases of civil detention. There was, also, no provision as to what was to happen if an untruthful return were made to the writ. According to a subsequent decision of the courts, the return may be impeached by affidavit. The Act also gave no protection where too high an amount was fixed as bail. Subsequently the Bill of Rights

[1] 56 Geo. III, c. 100.

(1688) provided that excessive bail ought not to be required. This, however, only amounted to a general declaration. It was not until 1898 that the Bail Act was passed, whereby magistrates may admit persons to bail, with or without sureties, in cases in which they have power to grant bail under the Indictable Offences Act, 1898. By the Criminal Justice Administration Act, 1914, a magistrate issuing a warrant must state in writing on its back the amount of bail he is prepared to accept, which bail may be taken before a superintendent of police. It may be added, however, that bail is frequently refused; and, when it is granted, it is usually fixed at a high amount.

Habeas corpus does not apply to commitments by either House of Parliament for breach of privilege, contempt, or offences against Parliament. Each House is the judge of its own internal affairs and discipline, and there is no external court or tribunal which can interfere, or judge whether a contempt has really been committed.

In practice, writs of *habeas corpus* are moved for in the King's Bench Division, which grants a rule directed to the keeper of the prison; or application may be made to a judge in chambers for a summons. The court may (though it rarely does so) grant an absolute order *ex parte*; the usual practice being to issue a rule, to give the other party (usually the Crown) an opportunity to oppose. The return must specify all the causes of detention, and, after considering these, the Court may either make no order, i.e. may consider the detention justified, or may discharge the person detained, or may grant bail.

The Habeas Corpus Act only applies to Great Britain. It was at one time doubted whether it could be issued by an English court to operate in the colonies. In the case of a fugitive slave named Anderson,[1] who had fled from the

[1] 30 L.J.Q.B. 129.

United States into Upper Canada (now Ontario), and was there kept a prisoner, pending the decision of the colonial authorities on the demand of the United States Government for his delivery under an Extradition Treaty, the demand being based on a charge of murder, the English Court of Queen's Bench granted a writ of *habeas corpus*, on a simple affidavit that Anderson was illegally detained at Toronto. The question of the jurisdiction of the English court was not finally decided, as the Canadian Court of Common Pleas granted its own writ (February 1, 1861), on which the prisoner was brought up and, after argument, discharged for informality in the warrant of commitment. The question as to the jurisdiction of the English court was set at rest by an Act of the British Parliament, providing that no writ of *habeas corpus* shall be sent from England into any colony or foreign Dominion of the Crown where there are courts of justice having authority to grant or issue such a writ and to ensure its due execution in the colony.[1]

As to crimes committed by British subjects, the English courts have always asserted their jurisdiction to try persons who have committed such serious felonies as treason and murder, even though the acts charged were done out of England. Thus, Sir Roger Casement was convicted of treason partly on the ground of things done by him in Germany during the Great War. And persons have been convicted of murder committed by them on British ships on the high seas, or outside of territorial waters. Thus, O'Donnell, who shot Carey, the informer, on the *Melrose*, in South African waters, was arrested, taken to London, tried and convicted at the Central Criminal Court, and executed. In the same way, the *Flowery Land* pirates, who had committed murder on a British ship on the

[1] 25 & 26 Vict., c. 20. The Act also applies to protectorates (R. v. *Crewe*, *supra*).

high seas, "within the jurisdiction of the Admiralty of England," were tried in London, and executed. By international law, however, the courts of all nations assert jurisdiction to try crimes of piracy, wherever committed.

With regard to fugitive offenders, who have escaped from England and taken refuge oversea, two methods of securing their arrest and bringing them before the English courts are applicable. The first of these applies to a case where a crime has been committed in England and the alleged offender has fled to a foreign country. In this case the procedure of extradition is invoked. This is governed in England by the Extradition Act, 1870. On the one hand, the extradition of a person who has committed an offence in a foreign State may be applied for. The offence must be one covered by, i.e. mentioned in, a treaty of extradition with such State. Application for the surrender of the alleged criminal, who may be either a British subject or a foreigner, must be made to a police magistrate at Bow Street. The person may be arrested by warrant. He is then brought before the magistrate, and the depositions must contain *prima facie* evidence of his guilt. A person may only be surrendered or tried in respect of the crime for which his extradition was demanded; and extradition may not be granted in respect of political offences. Reciprocally, application may be made to the courts of a foreign State with which an extradition treaty exists for the surrender for trial in England of a person who is alleged to have committed a crime in England and fled to such foreign country. The Extradition Act may be applied, on the one hand, to foreign States enumerated by Order in Council, and, on the other, to British colonies. In the case of the Dominions, it is usual for each Dominion to apply direct for the extradition of an offender to the foreign State with which a treaty for extradition exists.

The second method relates to the arrest of persons who have committed an offence in England or in one of the British possessions, and have fled to any other part of the British Empire. This is governed by the Fugitive Offenders Act, 1881, which in effect is an extradition Act for the various parts of His Majesty's Dominions. The Act applies to treason, piracy, and every offence, by whatever name called, punishable where it was committed by a minimum term of twelve months' imprisonment with hard labour. Any fugitive offender may be apprehended, and returned to the part whence he is a fugitive, either by warrant issued in one part of the King's Dominions and endorsed in another part by a judge of a superior court, or in the United Kingdom by a Secretary of State or a Bow Street metropolitan magistrate, or in a British possession by the Governor; or by provisional warrant issued by a magistrate of any part of the British possessions which the fugitive is suspected to be in or on his way to, on such information and in such circumstances as apply in the case of a local warrant, the warrant so issued to be backed and executed accordingly. The magistrate is to send a report to the Secretary of State, if the warrant be issued in the United Kingdom, or to the Governor, if it be issued in a possession: and either of them, if he thinks fit, may discharge the prisoner. On arrest, a fugitive offender is to be brought before a magistrate, and dealt with as if the offence were committed within his jurisdiction. If the warrant be duly authenticated, and *prima facie* evidence of the commission of the crime is furnished, the magistrate must commit the fugitive to prison and report the case to the Secretary of State or the Governor, who may then, after the observance of certain formalities, and after the expiry of fifteen days from committal, return the fugitive by warrant to the place whence he fled, to be dealt with in due course of

law. A person must be removed within one month after committal, or he may be discharged by a superior court. On arrival at the place to which he is sent, a fugitive must be prosecuted within six months, and failing that, or upon his acquittal, he must be sent back free of cost and without delay to the place in or on his way to which he was apprehended. The Act further provides that His Majesty may by Order in Council form groups of British possessions to facilitate the working of the Act as between themselves; and similar provisions are made for the return of offenders within a group.[1]

Jurisdiction may also be exercised by the English courts in terms of the Foreign Enlistment Act, 1870, whereby a British subject who accepts commissions or engagements in the military or naval services of any foreign State which is at war with any other foreign State with which Great Britain is at peace, or who conducts or equips or aids in any hostile expedition or movement against a foreign State with which Great Britain is at peace, is guilty of an offence and liable to be tried for it in the English courts.

The right of a person to be tried by a jury is secured by the Summary Jurisdiction Act, 1879, which provides that any person charged with an offence in respect of which he is liable to be imprisoned for a term exceeding three months, except on a charge of assault, may demand to be tried before a jury. Magistrates must inform prisoners of their right to be tried by a jury. Where the accused is a child of tender years, his parent or guardian may exercise the right to trial by jury on his behalf. Under the Aliens Restriction Acts, 1914 to 1918, previously referred to, any interested party in any proceeding, civil or criminal, may object to a foreigner being on a jury.

[1] For a full analysis of the Act, see Tarring, *ubi sup.*, pp. 159–66.

ADDENDUM

At the end of 1927 the Statutory Commission for the revision of the Indian constitution was appointed. Pending its report, and the changes consequent thereon, the statements in the text hold good as to the existing structure and machinery of government in India.

Iraq, as stated in the text, was entrusted to the mandate of Great Britain. By a treaty between Great Britain and Iraq, dated December 1927, the independence of Iraq was fully recognized. Great Britain, however, will not undertake to support the application of Iraq for admission to the League of Nations until 1932. The position of Iraq is thus exceptional from the point of view of International Law, as well as in British constitutional practice. In view of the recognition of her independence, she cannot be regarded as a protectorate, or under the suzerainty of Great Britain. The mandate, however, is a matter for the League. And the position of complete sovereign independence in International Law will depend upon the degree of recognition accorded by foreign States. Nevertheless, for all practical purposes, Iraq is now a "sovereign independent State."

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